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Supreme Court, U.S.
FILED

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No. _____

In The
Supreme Court of the United States

MICHIGAN FINANCIAL INVESTMENTS, L.L.C.,
Petitioner,

v.

DETROIT BUILDING AUTHORITY,
CITY OF DETROIT,
WAYNE COUNTY TREASURER,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Michigan

PETITION FOR WRIT OF CERTIORARI

MARK GRANZOTTO
Counsel of Record
MARK GRANZOTTO, P.C.
225 SOUTH TROY STREET
SUITE 120
ROYAL OAK, MI 48067
(248) 546-4649

Counsel for Petitioner

June 23, 2008

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED FOR REVIEW

1. DID THE MICHIGAN SUPREME COURT DENY PETITIONER ITS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW BY GIVING RETROACTIVE EFFECT TO A RULE PROMULGATED BY THE MICHIGAN STATE COMMISSION, WHICH CHANGED THE LAW APPLICABLE TO THIS CASE AND NULLIFIED A JUDGMENT OF FORECLOSING WHICH HAS BEEN ENTERED PREVIOUSLY?

RULE 29.6 STATEMENT

Petitioner Michigan Financial Investments, L.L.C. has no parent company, and no public company owns ten percent or more of its stock.

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OPINIONS BELOW

The March 28, 2008 Order of the Michigan Supreme Court denying Petitioner's Motion for Reconsideration is reported. *Detroit Building Authority v. Michigan Financial Investments, L.L.C.*, 745 N.W.2d 781 (Mich. 2008). That Order is also reproduced in the attached Appendix, beginning on page 68a.

The September 28, 2007 Order of the Michigan Supreme Court is reported. *Detroit Building Authority v. Michigan Financial Investments, L.L.C.*, 738 N.W.2d 767 (Mich. 2007). That Order is reproduced in the attached Appendix, beginning on page 1a.

The Michigan Court of Appeals' July 5, 2005 Opinion is not officially reported. That Opinion is reproduced in the attached Appendix, beginning at page 4a.

The December 1, 2003 Opinion of the Wayne County Circuit Court is not officially reported. That Opinion is reproduced in the attached Appendix, beginning at page 25a.

JURISDICTION

The Michigan Supreme Court issued an order reversing the decision of the Michigan Court of Appeals on September 28, 2007. (App. 1a). Petitioner filed a timely Motion for Reconsideration in the Michigan Supreme Court. That motion was denied in an order dated March 24, 2008. (App. 68a). This

Court's jurisdiction is being invoked on the basis of 28 U.S.C. §1257.

CONSTITUTIONAL PROVISION, STATUTE AND REGULATION INVOLVED

The Fourteenth Amendment to the United States Constitution

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Mich. Comp. Laws §211.78g(1)

Except as otherwise provided in this subsection, on March 1 in each tax year, certified abandoned property and property that is delinquent for taxes, interest, penalties, and fees for the immediately preceding 12 months or more is forfeited to the county treasurer for the total amount of those unpaid delinquent taxes, interest, penalties, and fees. If property is forfeited to a county treasurer under this subsection, the foreclosing governmental unit does not have a right to possession of the property until the April 1 immediately

succeeding the entry of a judgment foreclosing the property under section 78k or in a contested case until 22 days after the entry of a judgment foreclosing the property under section 78k. If property is forfeited to a county treasurer under this subsection, the county treasurer shall add a $175.00 fee to each parcel of property for which those delinquent taxes, interest, penalties, and fees remain unpaid. A county treasurer shall withhold a parcel of property from forfeiture for any reason determined by the state tax commission. The procedure for withholding a parcel of property from forfeiture under this subsection shall be determined by the state tax commission.

Michigan State Tax Commission Bulletin
Dated April 17, 2002

Reasons to Withhold a Parcel of Property From Forfeiture and Procedures for Withholding a Property From Forfeiture.

The State Tax Commission, at its meeting on April 17, 2002, determined that the following are the reasons that a parcel of property shall be withheld from forfeiture:

* * *

2) A property owned by the U.S. Government, the State of Michigan, a county, a city, a village or a township shall be withheld from forfeiture.

Procedure: If the property is forfeited in error, the County Treasurer removes all of the fees attached to the parcel, files a certificate of cancellation of forfeiture (form 3839) with the Register of Deeds. Notifies the State Treasurer and the Contractor of the error. The State Treasurer will withhold the parcel from foreclosure and stop all title work on the parcel.

STATEMENT OF THE CASE

In May 1997 the Detroit Building Authority (hereinafter: "Building Authority"), an independent governmental body incorporated by the City of Detroit, purchased two adjacent lots in downtown Detroit. At the time of the purchase, these two lots had separate addresses, 612 First Street and 431 West Congress. The Building Authority constructed a parking garage which covers both lots.

In 1998, the Building Authority entered into a long-term lease with the City of Detroit. That lease provided that the Building Authority would maintain ownership of the two lots, but when its bonds were retired, ownership interest in the property would be transferred to the City. The City, however, failed to record its lease or any memorandum concerning that lease in the Wayne County Register of Deeds.

The Building Authority requested that the two lots be merged into one tax parcel with a new address, 450 West Congress. The City of Detroit's Assessor granted the Building Authority's request and merged the two properties under this new address.

The Building Authority was obligated to pay 1997 real property taxes on the 612 First Street parcel. It failed to pay those taxes. On June 14, 2001, the Wayne County Treasurer filed a Petition for Foreclosure in the Wayne County Circuit Court on the 612 First Street parcel based on the unpaid county taxes for the year 1997. Notice of these proceedings was provided to the Building Authority, but not to the City of Detroit.

On March 4, 2002, the Wayne County Circuit Court entered a Judgment of Foreclosure. (App. 64a-67a). That Judgment specified that "all those entitled to notice and an opportunity to be heard had been provided that notice and opportunity." (App. 65a). The March 4, 2002 Judgment further indicated that as a consequence of that order:

> Fee simple title to each parcel foreclosed upon the judgment will vest absolutely in the Petitioner, without any further rights of redemption, if all the forfeited delinquent taxes, interest, penalties and fees foreclose against the parcel are not paid to the County Treasurer within 21 days after entry of this judgment.

(App. 66a). The twenty-one day redemption period specified in the court's March 4, 2002 Judgment passed without payment of the unpaid taxes. Nor was any appeal taken from the Judgment. Under a provision of Michigan's General Property Tax Act, Mich. Comp. Laws §211.78k(6), after the expiration of the twenty-one day redemption period, the Wayne County Treasurer took fee simple title to the property.

In 2001, the Michigan Legislature had amended another section of the General Property Tax Act, pertaining to tax forfeiture proceedings brought by a county treasurer, Mich. Comp. Laws §211.78g(1). In this 2001 amendment, the Legislature added language to this statute which indicated, "[a] county treasurer shall withhold a parcel of property from forfeiture for any reason determined by the state tax commission."

The State Tax Commission exercised the authority delegated to it under Mich. Comp. Laws §211.78g(1) by issuing a bulletin dated April 17, 2002, approximately one and one half months after the Judgment of Foreclosure was entered on the 612 First Street property. In that bulletin, the State Tax Commission identified a number of circumstances in which property should not be subject to foreclosure, including: "A property owned by the U.S. government, the State of Michigan, a county, a city, a village or a township shall be withheld from forfeiture."

Following the entry of the March 4, 2002 Judgment of Foreclosure, the Wayne County Treasurer scheduled a public auction of the 612 First Street parcel at the County's annual tax sale which took place on September 26, 2002. Petitioner, Michigan Financial Investments, L.L.C. (hereinafter: "Michigan Financial"), was the high bidder on the parcel with a bid of $370,000.00.

The day after the public sale took place, Michigan Financial paid the $370,000.00 auction price to the Wayne County Treasurer, which issued a Land Purchase Certificate to Michigan Financial.

On September 30, 2002, three days after Michigan Financial paid the $370,000.00 auction price to the Wayne County Treasurer, the Building Authority filed a cause of action in the Wayne County Circuit Court. That action, which was originally filed against only the Wayne County Treasurer, sought to set aside the March 4, 2002 Judgment of Foreclosure. Both the City of Detroit and Michigan Financial later intervened in this action.

On November 14, 2002, the Wayne County Treasurer attempted to cancel the sale of the parcel to Michigan Financial. On that date, the Wayne County Treasurer wrote a letter to a principal of Michigan Financial indicating that, "[t]he Treasurer's office has received information that the subject property was sold in error." On that basis, the Wayne County Treasurer advised Michigan Financial that its September 2002 purchase was being cancelled and the Treasurer returned the $370,000.00 payment which Michigan Financial made on September 27, 2002.

Michigan Financial filed claims in the pending circuit court action against the Building Authority, the City of Detroit and the Wayne County Treasurer. Michigan Financial sought a declaration that the Wayne County Treasurer's cancellation of the auction sale was invalid as well as a declaration that all legal interests of the Building Authority and the City of Detroit had been extinguished by the March 4, 2002 Judgment of Foreclosure.

In April 2003, Michigan Financial moved for partial summary disposition on its claims. A hearing was held on Michigan Financial's motion on May 30, 2003.

At that hearing, the circuit court orally granted Michigan Financial's request for a declaration that the City of Detroit's and the Building Authority's interests in the property had been extinguished following the expiration of the twenty-one day redemption period provided in the March 4, 2002 Judgment.

The circuit court issued a written Order Granting Partial Summary Disposition on June 25, 2003, which was consistent with its oral ruling. (App. 61a-63a). In that order, the circuit court indicated that, as part of the foreclosure process, "the interests of the City, the Building Authority and the City of Detroit Municipal Parking Department . . . in and to the Subject Property, were extinguished." (App. 62a). As a result, the circuit court ordered the Wayne County Treasurer to deliver to Michigan Financial a quit claim deed on the subject property. (*Id*).

On June 17, 2003, after the circuit court had orally granted Michigan Financial's motion for partial summary disposition, the City of Detroit moved for leave to file claims against the Wayne County Treasurer and Michigan Financial. The City of Detroit claimed in these pleadings that, prior to the March 2002 Judgment of Foreclosure, it had not received appropriate notice of the foreclosure proceedings as required by Michigan statutes and the United States Constitution. The circuit court granted the City of Detroit the right to proceed on these claims.

The City of Detroit and Michigan Financial filed cross-motions for summary disposition. The briefs which the parties filed in support of these motions focused on the adequacy of the notice provided to the

City of Detroit prior to the foreclosure. Michigan law provides that the owner of property which is subject to foreclosure, "is entitled to notice . . . if that owner's interest was identifiable" by reference to certain official tax and title records. Mich. Comp. Laws §211.78i(6); *cf. Mennonite Board of Missions v Adams*, 462 U.S. 791, 795-800 (1983). The primary dispute between the parties in their cross-motions for summary disposition was whether the City of Detroit's interest in the parcel was identifiable from the official records at the time the Wayne County Treasurer was taking the steps to foreclose on the property. The City of Detroit and the Building Authority argued that a review of the pertinent public records would have revealed the City's interest in the property. Michigan Financial, on the other hand, argued that the City of Detroit's interests in the property was not identifiable because the City had not property recorded its interest and because of the confusion created when the Building Authority took steps to merge the two parcels under a new address, 450 West Congress.

On December 1, 2003, the circuit court issued a written opinion addressing the parties' cross-motions for summary disposition. (App. 25a-58a). The court granted the City of Detroit's request for summary disposition, concluding that the notice provided to it by the Wayne County Treasurer did not strictly comply with the notice provisions contained in Michigan's General Property Tax Act. (App. 44a-54a). Based on that conclusion, the circuit court ruled that the City of Detroit was "entitled to a declaration setting aside the Foreclosure Judgment, and the sale of the Subject Parcel to Michigan Financial." (App. 57a).

Michigan Financial appealed this ruling to the Michigan Court of Appeals. The parties' briefs in that Court again concentrated on the question of whether the City of Detroit received proper notice of the foreclosure proceedings instituted by the Wayne County Treasurer.

On July 5, 2003, the Michigan Court of Appeals issued an opinion reversing the circuit court's judgment. (App. 4a-24a). The Court of Appeals rejected the City's claim that it was not provided adequate notice. The Court of Appeals majority held that anyone searching the public records "would be unable to discover the City's interest in the subject parcel." (App. 12a). The Court of Appeals further ruled that the City's interest in the property would not have been identifiable from the pertinent public records because of the City's own acts and omissions: "It was solely the City's fault that it did not receive notice of the foreclosure proceedings." (App. 12a).

The City of Detroit and the Building Authority applied for leave to appeal in the Michigan Supreme Court. In the briefs in support of these applications, both the City of Detroit and the Building Authority argued that the March 2002 Judgment of Foreclosure should be set aside because the notice provided to the City of Detroit before the entry of that Judgment was inadequate. In their applications for leave to the Michigan Supreme Court, both the City and the Building Authority argued an alternative basis for the reversal of the Court of Appeals' ruling. They contended that the foreclosure judgment entered by the circuit court in March 2002 should be set aside on the basis of the April 17, 2002 bulletin of the Michigan

State Tax Commission, which exempted property held by governmental entities from tax forfeitures.

On September 28, 2007, the Michigan Supreme Court issued an order reversing the judgment of the Michigan Court of Appeals. (App 1a-3a). In support of its ruling, the Michigan Supreme Court indicated that, "[t]he foreclosure sale of publically owned property is prohibited. MCL 211.78g(1)."

Michigan Financial filed a timely Motion for Reconsideration. In that motion, Michigan Financial argued that the Michigan Supreme Court's reliance on Mich. Comp. Laws §211.78g(1) to void the judgment of foreclosure entered in March 2002 constituted an inappropriate retroactive application of the State Tax Commission's rule exempting government owned property from forfeiture proceedings. Thus, Michigan Financial argued in its Motion for Reconsideration that the Michigan Supreme Court's September 28, 2007 order violated its right to due process of law as guaranteed by the United States Constitution.

On March 24, 2008, the Michigan Supreme Court issued an order denying Michigan Financial's Motion for Reconsideration. (App. 68a-69a).

REASON FOR GRANTING THE WRIT

In its September 28, 2007 order, the Michigan Supreme Court found for the City of Detroit and the Building Authority under Mich. Comp. Laws §211.78g(1), based on its conclusion that this statute provides that "[t]he foreclosure sale of publicly owned property is prohibited." (App. 2a).

Mich. Comp. Laws §211.78g(1) does not itself provide for such a prohibition. Rather, that statute, as amended in 2001, specifies that the State Tax Commission has the authority to determine what property would be exempted from a county treasurer's forfeiture proceeding. The State Tax Commission later exercised the authority delegated to it under Mich. Comp. Laws §211.78g(1). On April 17, 2002, it issued a bulletin to all Michigan county treasurers outlining nine different circumstances in which property could not be subject to forfeiture. One of these nine exceptions identified in the April 17, 2002 bulletin was the circumstance in which the subject property was owned by a governmental entity.

It is obviously this State Tax Commission rule, made applicable to county treasurers through Mich. Comp. Laws §211.78g(1), which the Michigan Supreme Court relied on in concluding that the foreclosure in this case was of no effect because the forfeiture of publically owned property is prohibited. (App. 2a). The Michigan Supreme Court's decision to apply the State Tax Commission's April 17, 2002 rule altering existing law and prohibiting the forfeiture of publically owned property raises a significant constitutional issue. That issue arises out of the fact that the Michigan Supreme Court's ruling in this case gives retroactive effect to the State Tax Commission's April 17, 2002 rule to void a Judgment of Forfeiture which had been entered forty-four days before. (App. 64a-67a).

This Court has recognized that "[r]etroactive legislation presents problems of unfairness that are more serious than those posed by prospective

legislation, because it can deprive citizens of legitimate expectations and upset settled transactions." *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992); *cf Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988); *Eastern Enterprises v. Apfel*, 524 U.S. 498, 548 (1998) ("if retroactive laws change the legal consequences of transactions long closed, the change can destroy the reasonable certainty and security which are the very objects of property ownership.") (J. Kennedy, concurring).

This Court has also recognized that the retroactive application of state law presents specific due process concerns:

> It does not follow, however, that what Congress can legislate prospectively it can legislate retrospectively. The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former.

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16-17 (1976). What is of considerable import in this case is that when the Judgment of Foreclosure was entered on March 4, 2002, the owners of that property had twenty-one days in which to redeem. Under Michigan's General Property Tax Act, with the expiration of that time period, the Wayne County Treasurer became the fee simple title holder to this property. Mich. Comp. Laws §211.78k(6). If the Michigan Supreme Court's decision in this case stands, this interest which the Wayne County Treasurer acquired as of March 26, 2002, has been undone by a

State Tax Commission rule fundamentally changing existing law, which was issued after that judgment was entered.[1]

The retroactive application of the State Tax Commission's April 17, 2002 rule altering Michigan law as to the forfeiture of publically owned property raises fundamental due process concerns. As expressed by this Court in *Davidson v. New Orleans*, 96 U.S. 97, 102 (1877):

> It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B., would, if effective, deprive A. of his property without due process of law, within the meaning of the constitutional provisions.

see also Jones v. Meehan, 175 U.S. 1, 32 (1899); *cf Wood v. Lovett*, 313 U.S. 362, 369 (1941). Under the law as it existed on May 26, 2002, when the twenty-

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[1] The Michigan Supreme Court's ruling in this case also results in a final circuit court judgment being reversed on the basis of the retroactive application of an administrative rule. If such a scenario arose in a federal court, it would appear that the retroactive application of such a rule which has the effect of overruling a final court judgment would be unconstitutional on other grounds. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). Michigan law also recognizes the separation of powers concerns expressed by this Court in *Plaut*. *Quinton v. General Motors Corp.*, 551 N.W.2d 63 (Mich. 1996). These separation of powers issues were raised by Petitioner in the Michigan Supreme Court, but were never addressed by that Court.

one day period from the date of the Judgment of Foreclosure expired, the property rightfully belonged to the Wayne County Treasurer. That property, however, was taken from the Wayne County Treasurer and given to the City of Detroit on the basis of a rule adopted later by the State Tax Commission. As *Davidson* demonstrates, this represents a deprivation of property without due process of law.

The Michigan Supreme Court's application of the State Tax Commission's rule to this case in which the Judgment of Foreclosure was already entered constitutes what is often referred to as "primary retroactivity" - where "the new provision attaches new legal consequences to events completed before its enactment." *Landgraf v. USI Film Products*, 511 U.S. 244, 270 (1994); *Bowen,* 488 U.S. at 219 (J. Scalia concurring). Here, a transfer of property which was consistent with Michigan law at the time it took place has been declared invalid based on a new legal guideline promulgated after that transfer was effectuated. Petitioner would respectfully suggest that this Court should review the question of whether this retroactive application of the State Tax Commission's rule, which clearly "upset settled transactions," *Romein*, 503 U.S. at 191, violates Petitioners' due process rights.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Mark Granzotto
Counsel of Record
225 South Troy Street, Suite 120
Royal Oak, MI 48067
(248) 546-4649

Counsel for Petitioner

Dated: June 23, 2008

APPENDIX

APPENDIX A

Supreme Court of Michigan

Docket No. 129743
COA No. 253479
Wayne CC: 02-234701-CH

[Filed September 28, 2007]

DETROIT BUILDING AUTHORITY,
Plaintiff/Cross Defendant-Appellee,

and

CITY OF DETROIT,
Intervening Plaintiff/Counter Plaintiff/Cross Plaintiff-Appellee,

v.

WAYNE COUNTY TREASURER,
Defendant/Cross Defendant/ Counter Defendant-Appellee,

and

MICHIGAN FINANCIAL INVESTMENTS, L.L.C.,
Intervening Defendant/Cross Plaintiff/ Counter Defendant-Appellant.

By order of March 27, 2006, the application for leave to appeal the July 5, 2005 judgment of the Court of Appeals was held in abeyance pending the decision in *In re Petition by Treasurer of Wayne County for Foreclosure* (Docket No. 129341). On order of the Court, the case having been decided on May 23, 2007, 478 Mich. 1, 732 N.W.2d 458 (2007), the application is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we REVERSE the judgment of the Court of Appeals and we REINSTATE the order of the Wayne County Circuit Court setting aside the foreclosure sale and quieting title to the property in the plaintiff. The foreclosure sale of publicly owned property is prohibited. MCL 211.78g(1). Contrary to the Court of Appeals majority's conclusion, the Wayne County Treasurer had reason to know that the property was publicly owned because there is no dispute that the plaintiff Detroit Building Authority, which was incorporated by the intervening plaintiff City of Detroit, MCL 123.951, was the owner of record and had filed both a deed and an affidavit of property transfer notifying the county that the property was tax exempt.

MARKMAN, J., concurs and states as follows:

I concur in the decision to reverse the Court of Appeals; however, I would do so on different grounds. It is undisputed that the city of Detroit was the taxpayer of record in the local assessor's office at the time of the foreclosure. Because the city's interest was "identifiable by reference to ... [t]ax records in the office of the local assessor," MCL 211.78i(6)(c), the Wayne County Treasurer was required to send notice by certified mail. MCL 211.78i(2). Moreover, because

the city's interest was "reasonably identifiable" under the records of the local assessor, merely posting a foreclosure notice and publishing such notice in a newspaper was not constitutionally adequate. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798-799, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983). Accordingly, the Court of Appeals erred by concluding that the treasurer "afforded the City the required due process."

[Seal of the Michigan Supreme Court Lansing]

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 28, 2007 /s/ Corbin R. Davis
Clerk

APPENDIX B

STATE OF MICHIGAN
COURT OF APPEALS

No. 253479
LC No. 02-234701-CH

[Filed July 5, 2005]

DETROIT BUILDING AUTHORITY,
Plaintiff/Cross Defendant-Appellee,

and

CITY OF DETROIT,
Intervening Plaintiff/Counter
Plaintiff/Cross Plaintiff-Appellee,

v.

WAYNE COUNTY TREASURER,
Defendant/Cross Defendant/
Counter Defendant-Appellee,

and

MICHIGAN FINANCIAL
INVESTMENTS, L.L.C.,
Intervening Defendant/Cross Plaintiff/
Counter Defendant-Appellant.

Before: GAGE, P.J., and CAVANAGH and GRIFFIN, JJ.

[UNPUBLISHED]

PER CURIAM.

Michigan Financial Investments, LLC (MFI) appeals as of right the opinion and order granting summary disposition in favor of the City of Detroit (the City) and denying MFI's cross-motion for summary disposition. We reverse and remand.

This appeal arises from a dispute concerning the foreclosure of real property in downtown Detroit. In May 1997, the Detroit Building Authority (DBA) used bond proceeds to purchase two adjacent lots and construct a ten-story parking garage that spans both lots. In 1998, DBA and the City entered into a long-term lease in accordance with the building authority act, MCL 123.951 *et seq.* The lease provides that when DBA's revenue bonds are retired, DBA will convey title of the land to the City. See MCL 123.963. The two parcels of land, with addresses 612 First Street and 432 W. Congress, were combined into one tax parcel with a new address, 450 W. Congress, in 1998. DBA filed a property transfer affidavit identifying itself as the purchaser and indicating its tax-exempt status. See MCL 211.27a(10). The City did not file a property transfer affidavit indicating its interest. The City's Municipal Parking Department, who had operated the garage since its opening, was designated as the taxpayer of record. Because no cross-references to the former tax parcels were made,

a search of public city records for the former addresses would not indicate the City's interest in the property.

The Wayne County Treasurer (the Treasurer) determined that county taxes on the parcel formerly known as 412 First Street[1] were not paid for 1997, and he initiated foreclosure proceedings.[2] Notice of the proceedings was sent to DBA, but not the City. The trial court entered a judgment of foreclosure, and neither the City nor DBA appealed the judgment or attempted redemption. MFI placed the winning bid at the foreclosure auction and tendered payment. The redemption period passed without any redemption of the property occurring.

DBA then filed a lawsuit against the Treasurer, seeking to set aside the judgment of foreclosure. After MFI and the City intervened, the Treasurer cancelled the auction sale, refunded MFI's payment, and permitted the City to redeem the property.[3] Following this redemption, DBA and the City voluntarily dismissed their claims. MFI then filed a claim against DBA, the Treasurer, and the City, seeking title to the property. The trial court granted MFI's motion for partial summary disposition of its claim, granting title

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[1] The garage occupies both parcels, but this case only concerns the parcel formerly known as 412 First Street.

[2] Although real property acquired by building authorities is exempt from taxation, the taxes levied during the twelve-month period preceding the sale are prorated between the seller and purchaser. MCL 211.2(3).

[3] The Treasurer never delivered the deed to MFI.

in MFI's favor. Then it permitted the City to file a claim against the Treasurer and MFI for title to the property, ultimately granting summary disposition in the City's favor and vacating its prior order.

MFI argues that the circuit lacked jurisdiction over the City's claim because the court of claims has exclusive jurisdiction. Whether the trial court had jurisdiction is a question of law, which we review de novo. *Travelers Ins Co v. Detroit Edison Co,* 465 Mich. 185, 205; 631 NW2d 733 (2001).

Pursuant to Const 1963, art 6, § 13, circuit courts have original jurisdiction in all matters not prohibited by law. Circuit courts have "original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state." MCL 600.605. MCL 600.6419 grants the court of claims exclusive jurisdiction over some claims against the state and its subparts. Subsection (4) states: "[t]his chapter shall not deprive the circuit court of this state of jurisdiction over ... proceedings for declaratory or equitable relief, or any other actions against state agencies based upon the statutes of this state in such case made and provided, which expressly confer jurisdiction thereof upon the circuit court...."

The trial court did not err in asserting subject-matter jurisdiction. The nature of the claim, not its wording, determines whether the court of claims has jurisdiction. *Parkwood Limited Dividend Housing Ass'n v State Housing Development Authority,*

468 Mich. 763, 770; 664 NW2d 185 (2003). On its face, the City's cross-claim and counterclaim is for declaratory and injunctive relief seeking to quiet title. It is an action in rem concerning real property, not a personal action against the Treasurer for a tort or contract claim that the court of claims should hear pursuant to MCL 600.6419. The court of claims has merely concurrent jurisdiction with the circuit court over declaratory and injunctive actions that are ancillary to a tort or contract claim. MCL 600.6419a.

MFI contends that MCL 211.781(1) of the General Property Tax Act confers exclusive jurisdiction on the court of claims. However, it only bars actions for *possession*. *Id.* (emphasis added). The City was already in possession of the property when it filed its complaint. Because the Treasurer had not delivered the deed to MFI, legal and physical possession were not the goal of the City's lawsuit. The action sought to prevent the Treasurer from delivering and obtaining a declaration of its right to the property. Accordingly, the trial court did not err in exercising subject-matter jurisdiction.

MFI next contends that the City lacked standing to file the lawsuit. Whether a party has standing is a question of law that we review de novo. *Lee v. Macomb Co Bd of Comm'rs,* 464 Mich. 726, 734; 629 NW2d 900 (2001).

The City lacked standing because the foreclosure judgment was valid and extinguished the interest of DBA and the City. The validity of the judgment is apparent if one reviews the steps required of the

Treasurer pursuant to MCL 211.78 *et seq.*[4] After identifying the property as delinquent on its taxes, the Treasurer mailed the required notices to DBA. The City did not receive mail notices because its interest in the property was not properly recorded and the merger was not properly cross-referenced. Pursuant to MCL 211.78e, the Treasurer properly created a list of delinquent properties. The subject parcel was listed according to the address and tax identification number that were on record, and the City received this list. The Treasurer also provided notice by publication and sent an agent to personally visit the property pursuant to MCL 211.78i(3) and MCL 211.78i(6). The agent found the garage closed and the portion of it that occupies the subject parcel to be unoccupied. He posted notice in a conspicuous location pursuant to MCL 211.78i(3)(d).

MCL 211.78i(6) entitles a property owner to notice if that owner's interest is identifiable by reference to records in the office of any of the following: the county register of deeds, the county treasurer, the local assessor, or the local treasurer. The City's failure to record its interest or the merger of its property for tax purposes rendered any search of county records futile.

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[4] This statutory framework applies despite the fact that the original delinquent tax was for 1997 and MCL 211.78a(1) refers only to "taxes levied after December 31, 1998...." The Treasurer did not institute foreclosure proceedings until after the effective date of the statute. Moreover, the tax bill at issue included interest that accrued after the effective date. Levy means "[t]o impose or assess (a fine or a tax) by legal authority." Black's Law Dictionary (8th ed). The tax at issue was therefore levied or imposed after MCL 211.78 *et seq.* was enacted in its current form.

Because city records are by law shared with the county, the Treasurer effectively searches all four sources by searching the county records. MCL 211.30(6). It was therefore error for the trial court to require the Treasurer to independently search all four sources. It is also too onerous to suggest, as the trial court did, that expansive inquiry beyond searching publicly available computer records was necessary. *Republic Bank v. Genesee Co Treasurer,* 471 Mich. 732, 741; 690 NW2d 917 (2005). The City itself was unable to figure out the missing paper trail of the property until it accessed its own internal archival records, a burdensome task that the statute never meant to impose on a foreclosing governmental unit. Strict compliance with the statutory notice provisions is not necessary, and we are convinced that the Treasurer afforded the City the required due process.[5] *Wayne Co Treasurer v Westhaven Manor Limited Dividend Housing Ass'n,*___ Mich.App ___; ___ NW2d ___ (Docket No. 249807, issued February 24, 2005), slip op, pp 6-7.

The Treasurer filed a certificate of foreclosure as required by MCL 211.78g, and the court entered a judgment of foreclosure. DBA and the City failed to exercise any redemption rights or appeal the foreclosure judgment. Two months before the auction, the Treasurer provided the mayor and the city clerk a

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[5] The City asserts that publicly owned real property may not be sold at a foreclosure auction. See MCL 211.371. We need not consider this argument because the Treasurer never received the required notice of the City's interest. *Ziegler v. Simmons,* 353 Mich. 432, 439; 91 NW2d 819 (1958).

list of foreclosed properties and an option to purchase. The City did not exercise the option to purchase or attempt to redeem at the auction sale. DBA did not file its lawsuit until after MFI placed the high bid at auction. The City intervened one week later.

Pursuant to MCL 211.78m(2), "property shall be sold to the person bidding the highest amount above the minimum bid." Furthermore, the Treasurer was required to convey the property to MFI as follows:

> Not more than 30 days after the date of a sale under this subsection, the foreclosing governmental unit *shall* convey the property by deed to the person bidding the highest amount above the minimum bid. The deed *shall* vest fee simple title to the property in the person bidding the highest amount above the minimum bid. [*Id.* (emphasis added].

The Legislature's use of the word "shall" designates mandatory, not discretionary action. *Salter v. Patton,* 261 Mich.App 559, 565; 682 NW2d 537 (2004).

The Treasurer cancelled the auction sale and refunded MFI's payment, referencing the sale receipt in which MFI acknowledged that it was bound by the "Rules and Regulations" of the sale, which gave the Treasurer the right to cancel at any time. Those same rules, however, incorporate the mandatory language of MCL 211.78m. Accordingly, MFI was entitled to the deed, and the City's interest in the land was extinguished. The City therefore had no standing to bring its claim. For the same reasons, DBA also lacks standing.

MFI argues that the trial court abused its discretion in granting the City relief from the foreclosure judgment pursuant to MCR 2.612. A trial court's decision to grant relief under MCR 2.612 is reviewed for an abuse of discretion. *Inverness Mobile Home Community, Ltd v Bedford Twp,* 263 Mich App 241, 246; 687 NW2d 869 (2004).

MCR 2.612(C)(1) allows relief from a judgment for a variety of grounds. Although the lower court did not specify which subsection it relied on, it is evident that its basis was the catchall provision of subsection (f), which provides "[a]ny other reason justifying relief from the operation of the judgment."

The apparent ground for the trial court's decision to grant relief pursuant to MCR 2.612(C)(1)(f) was that the City did not have notice of the foreclosure. That finding was in error. It was solely the City's fault that it did not receive notice of the foreclosure proceedings. The City failed to properly record its interest in the property, and the merger was not properly crossreferenced. When it merged the subject property with the adjacent property for tax purposes, it did not file the proper affidavit, which would have linked the record for the new address and tax identification number with the former ones. The record of the former address and tax identification number then ceased to exist. Anyone searching public records for the owner of the property, as the Treasurer attempted, would be unable to discover the City's interest in the subject parcel. The trial court placed too great a burden on the Treasurer when it opined that revealing to the record-keepers the purpose and extent of one's search might have made the effort something other than futile.

Furthermore, the Treasurer is not required to request access to archival material that is unavailable to the public.

Although the trial court correctly noted that the City expeditiously intervened in the action following the foreclosure, the City failed to take advantage of the many opportunities to exercise its right to redeem the property. Instead, it piggybacked on the claims of other parties for eight months before moving for leave to file the cross-claim and counterclaim now on appeal. The City only filed this motion after the trial court granted relief to MFI and rejected the same arguments the City would ultimately repeat successfully. The grant of the motion therefore provided the City yet another opportunity to redeem the subject property, as opposed to an equitable accommodation of a situation that denied a party a meaningful defense in the first place. It was thus an abuse of the rule for a purpose it was never meant to serve.

Because the City lacked standing and was not entitled to relief from the judgment of foreclosure, it is not necessary to consider the remaining issues.

We reverse and remand for entry of a judgment instructing the Treasurer to convey title in fee simple to MFI in exchange for the auction price. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Mark J. Cavanagh

GRIFFIN, J. (dissenting). GRIFFIN, J.

I respectfully dissent. While I agree with the majority's conclusion that the circuit court properly exercised subject-matter jurisdiction over the City of Detroit's claim, see *In re Petition by Wayne County Treasurer for Foreclosure of Certain Lands for Unpaid Property Taxes,* 265 Mich.App 285, 290-295;___ NW2d ___ (2005), I disagree with that portion of the majority opinion concluding that the City lacked standing to file the present action and further holding that the trial court abused its discretion in granting the City relief from the foreclosure judgment pursuant to MCR 2.612(C)(1)(f). I would affirm the trial court's order granting summary disposition in favor of the City and denying Michigan Financial Investments' cross-motion for summary disposition.

I

Whether a party has standing is a question of law that this Court reviews de novo. *Lee v. Macomb Co Bd of Comm'rs,* 464 Mich. 726, 734; 629 NW2d 900 (2001). A party must have a "'legally protected interest that is in jeopardy of being adversely affected'" in order to have standing to bring suit. *Bowie v. Arder,* 441 Mich. 23, 34; 490 NW2d 568 (1992), quoting *Tallman v. Milton,* 192 Mich.App 606, 612-613; 482 NW2d 187 (1992). A party must have some "'real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy.'" *Id.* at 42, quoting 59 Am Jur 2d, Parties, § 30, p. 414. As further explained by this Court in *Taylor v. Blue Cross & Blue Shield,* 205 Mich.App 644, 655-656; 517 NW2d 864 (1994), "[t]o have standing, a plaintiff must

demonstrate a legally protected interest that is in jeopardy of being adversely affected and must allege a sufficient personal stake in the outcome of the dispute to ensure that the controversy to be adjudicated will be presented in an adversarial setting that is capable of judicial resolution. Generally, a plaintiff shows a personal stake in a lawsuit by demonstrating injury to the plaintiff or the plaintiff's personal property." A party need not own the property that is the subject of litigation to have standing to initiate the litigation. See *Hart v. City of Detroit,* 416 Mich. 488, 503; 331 NW2d 438 (1982).

In the present context, the City asserts that its property interests have been infringed upon without due process of law. The City has more than an abstract interest in the outcome of this case-it has a legitimate claim of entitlement to a future interest based on its written contract and lease agreement with the Detroit Building Authority (DBA), wherein the DBA granted the City a possessory interest estate for years (with the landlord DBA having a reversionary interest) and also a remainder interest. Thus, under the circumstances, the City has a significant interest in the property at issue which confers standing and entitles it to pursue its claim challenging the validity of the foreclosure judgment. See *Taylor, supra.*

Moreover, as the trial court concluded in its well-written opinion,

> Michigan Financial maintains that the City lacks standing to pursue its claims because the interest of the record title holder, the DBA, was extinguished through the entry of the

foreclosure judgment. Michigan Financial cites *Dolese v. Bellows-Claude Neon Co,* 261 Mich. 57 (1932), in support of its argument as standing for the principle that lease rights of real estate tenants terminate upon the expiration of their landlord's rights of redemption.

However, the rule adopted by the Supreme Court in *Dolese,* involves the situation in which the mortgage that was foreclosed predated the lease. See for example, *Schaffer v Eighty-One Hundred Jefferson Ave East Corp,* 267 Mich. 437, 447 (1934) (citing *Dolese* for the proposition that "subsequent lessees are not necessary parties to the foreclosure suit"). To the extent that the law of mortgage foreclosures can be applied to the law of tax foreclosures, *Dolese* would not apply to our case since the City's interest predated the foreclosure proceedings upon which Michigan Financial's interests depend. In any event, Michigan Financial fails to cite authority that applies *Dolese* to the situation of proceedings initiated by the government to forfeit property in which the governmental agency failed to give constitutionally required notice to those having significant property interests in the forfeited property. In light of the foregoing, this Court finds that the extinguishment of DBA's interests in the subject parcel did not necessarily eliminate the City's interest.

The trial court's sound reasoning in this regard provides further grounds for my conclusion that the City has standing to pursue the present action

asserting that its legally protected property rights were placed in jeopardy.

II

Furthermore, I find no abuse of discretion in the trial court's decision granting the City relief from the foreclosure judgment pursuant to MCR 2.612(C)(1)(f). Interpretation of court rules is subject to de novo review on appeal. *St. George Greek Orthodox Church v Laupmanis Associates, PC,* 204 Mich.App 278, 282; 514 NW2d 516 (1994). Pursuant to MCR 2.612(C)(1)(f), relief from a final judgment, order or proceeding may be granted for "any reason justifying relief from the operation of the judgment." A trial court's decision to grant such relief is reviewed for an abuse of discretion. *Detroit Free Press, Inc v. Dept of State Police,* 233 Mich.App 554, 556; 593 NW2d 200 (1999); *Driver v. Hanley (After Remand),* 226 Mich.App 558, 564-565; 575 NW2d 21 (1997). An abuse of discretion occurs when the trial court's decision is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Spalding v. Spalding,* 355 Mich. 382, 384-385; 94 NW2d 810 (1959).

"[U]nder MCR 2.612(C), [a circuit court] retains the ability to modify or vacate the [foreclosure] judgment or order it issued pursuant to an invalid proceeding after finding that an interested party whose rights were adversely affected by the judgment order was not afforded minimum due process." *In re Petition by Wayne County Treasurer, supra* at 293. In *Trost v.*

Buckstop Lure Co, Inc, 249 Mich.App 580, 589; 644 NW2d 54 (2002), this Court delineated the circumstances under which relief from judgment pursuant to MCR 2.612(C) is appropriately granted:

> [f]ive essential elements must be satisfied for a party to be entitled to independent equitable relief: (1) the judgment is one that ought not, in equity and good conscience, be enforced, (2) there is a valid defense to the alleged cause of action on which the judgment is founded, (3) fraud, accident, or mistake prevented the defendant from obtaining the benefit of the defense, (4) there was no negligence or fault on the part of the defendant, and (5) there is no adequate remedy available at law.

Here, the trial court, cognizant of the *Trost* decision, concluded that "[t]here is little doubt that, with respect to the entry of the foreclosure judgment, all of these elements are satisfied in light of the City's lack of actual notice of the foreclosure proceedings." I agree.

Where, as here, a property interest owner seeks to invalidate a foreclosure, the issue of notice raises constitutional due process concerns. "[T]he Due Process Clause requires that a owner of a significant interest in property be given proper notice and an opportunity for a hearing at which he or she may contest the state's claim that it may take the property for nonpayment of taxes...." *Dow v. Michigan,* 396 Mich. 192, 196; 240 NW2d 450 (1976). "Clearly, the applicable provisions of the GPTA [General Property Tax Act, MCL 211.1 *et seq.*] require that interested

parties, at a minimum, be provided with due process." *In re Petition by Wayne County Treasurer, supra* at 292. "The notice provisions contained in [the GPTA] are designed to ensure that those with an interest in the subject property are aware of the foreclosure proceedings so that they may take advantage of their redemption rights." *Id.* at 292-293. The critical question for purposes of due process in a foreclosure situation is whether the interested party has been given notice and a meaningful opportunity to be heard; "deprivation of property by adjudication must be preceded by notice and opportunity appropriate to the nature of the case, and within the limits of practicability." *Republic Bank v. Genesee County Treasurer,* 471 Mich. 732, 742; 690 NW2d 917 (2005). See also *Dow, supra* at 205-206. Any proceeding conducted under the GPTA without due process is invalid. *In re Petition by Wayne County Treasurer, supra* at 293, citing MCL 211.78i(2).

A court considering a due process claim must consider if any procedural protections are due and, if so, what process is due. *Dow, supra* at 203. Here, because the City had a present property interest at stake before the foreclosure, it was due some procedural protections. *Id.* at 205. The City, as the taxpayer of record, a lessee with actual possession with a vested future interest, and the statutory residual owner of the Millennium Garage property, has a recognized property interest under Michigan law that could not be extinguished without due process. *Id.* See also *Mennonite Board of Missions v. Adams,* 462 U.S. 791, 798; 103 S Ct 2706; 77 L.Ed.2d 180 (1983). As the trial court correctly noted, "[T]he City's rights in the subject parcel flow from both the provisions of

the lease itself and the DBA, and the unique relationship between a building authority and the incorporating municipality created by the [Building Authority] Act." The trial court thus did not err in holding that the City was entitled to notice reasonably calculated to apprise it of the pending tax foreclosure proceedings. *Mullane v Central Hanover Bank & Trust Co,* 339 U.S. 306, 314; 70 S Ct 652; 94 L.Ed.2d 865 (1950).

On the basis of the record, I would further conclude that the trial court did not err in finding that the County failed to comply with the statutory notice requirements of the GPTA, MCL 211.78i, and, as a result, did not satisfy constitutional due process requirements to provide notice. The trial court held in pertinent part that

> First, it is now undisputed that the County failed to review the records of the City's Assessor or Treasurer. Therefore, the County failed to comply with the requirements of § 78i(6)(c) and (d), and thereby failed to avail itself of a ready means of ascertaining the City's interest in the matter, since the Assessor or the Treasurer's records would have revealed that the City was the taxpayer of record.
>
> Michigan Financial asserts, that the County's failure to make an inquiry into the records of the City's Assessor and Treasurer should be excused because, assertedly, a search of these records would not have, in fact, revealed the City's interest. To support this conclusion, Michigan Financial relies on the

> affidavit of O'Malley [no reference to first name], who attests that upon his inquiry, neither the City's Treasurer nor the City's Assessor could locate the Subject Parcel under its former address and tax number.... However, the Court does not find O'Malley's statements, even if true, to be conclusive. O'Malley's affidavit does not reveal whether he disclosed the purpose of his inquiry or the extent to which he sought to have the Treasurer or Assessor identify the current tax parcel number or address for the Subject Parcel. Nor could O'Malley give any testimony of what the County might have ascertained had it complied with its duty to make an inquiry of the City's Assessor and Treasurer's offices several years ago.

Although it may be that the address of 612 First Street and item number 2003-15 are not presently located on the City's computerized record of its current tax roll, it does not follow that an inquiry to the City's Assessor and Treasurer would have been futile as suggested by Michigan Financial. The records produced by the City in support of its motion demonstrate that an inquiry into the City's archival records would have, in fact, uncovered not only the existence of such an address, but also the City's interest in that parcel. In short, the Court does not find that there exists a sufficient basis for excusing the County's failure to comply with the requirements of § 78i(6)(c) and (d). Instead, the Court finds that the existence of the fact that the City had an interest in the Subject Parcel would have been revealed by inquiry to the City Assessor and Treasurer.

Additionally, the Court finds that the County failed to comply with the requirements of § 78i(3).... Visiting property for the purpose of attempting to personally serve the occupant on a day, such as Saturday, on which its business is closed, and when none of the employees may be present, can hardly be said to be a measure calculated to effectuate this purpose or to apprise the business of the pendency of a hearing. Indeed, having only visited the premises on [a] day when the Millenium Parking structure was closed, the process server could not have legitimately concluded that he was "not able to personally meet with the occupant," for purposes of § 78i(3). Thus, the County could not satisfy its obligation to provide the City with notice through posting under § 78i(3).

The only other method by which the County attempted to notify the City of the pendency of the foreclosure proceedings was through publication. Under § 78i(5), the County could utilize this method only if the County was "unable to ascertain the address reasonably calculated to apprise the owners of a property interest entitled to notice under this section, or is unable to serve the owner of a property interest." However, as previously noted, the City's interest was readily identifiable through the records of the City's Treasurer or Assessor. Also, it is significant that the County at some point became aware of the interest of the DBA in the property. This fact should have also alerted the County to the interest of the City, since by statute, property owned by a building authority is subject to being leased to the incorporating municipality in whose name title to the property ultimately will vest. See MCL 123.958.

Beyond the foregoing considerations, *the strongest indicator that the City's interest was easily identifiable was that it was in actual possession of the Millennium Garage. See Dow, supra. Because the City actually occupied, and indeed operated the Millennium Garage through the City's Parking Department, had the County made a reasonable attempt to visit the Millennium Garage for the purpose of making personal contact with someone who worked there, i.e., during weekdays and normal business hours when the Garage was actually open for business and employees were present, there is little doubt that the City's interest could have been easily discovered, and, in turn, its address readily ascertained.* [Emphasis added.]

For the above reasons, the trial court concluded that the City's due process right to notice of the pendency of the foreclosure proceedings was violated. I agree with the trial court's well-reasoned assessment. Because the interest of the City in the property at issue was readily identifiable either through a search of the records of the City's treasurer or assessor, or in light of the City's actual occupancy of the parcel, the County was obligated to make reasonable efforts to notify the City of the pendency of the foreclosure proceedings, yet the record reflects that the County failed to give the City constitutionally sufficient notice. *Republic Bank, supra; Dow, supra.* The foreclosure proceeding was therefore invalid.

I would hold that the trial court did not abuse its discretion in granting the City relief from the foreclosure judgment pursuant to MCR 2.612(C)(1)(f). Accordingly, I would affirm the trial court's order granting summary disposition to the City and denying

Michigan Financial's cross-motion for summary disposition.

/s/ Richard Allen Griffin

APPENDIX C

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE

Case No. 02-234701-CH

[Filed December 1, 2003]

CITY OF DETROIT BUILDING AUTHORITY,
Cross Defendant,

and

CITY OF DETROIT,
Cross Defendant, Cross Plaintiff,
Counter Plaintiff,

-v-

WAYNE COUNTY TREASURER,
Cross Defendant,

-and-

MICHIGAN FINANCIAL
INVESTMENTS, L.L.C.,
Cross Plaintiff, Counter Defendant.

OPINION

I. Introduction and Facts.

This matter is before the Court on cross motions for summary disposition brought by the City of Detroit (the City) and Michigan Financial Investments, L.L.C. (Michigan Financial). The City seeks a declaratory judgment that it has redeemed or may redeem from tax foreclosure judgment certain property that is the subject of this lawsuit; that all ownership interests that existed in the subject property prior to the Judgment are restored; and that the Wayne County Treasurer and Michigan Financial do not possess any interest in the Property. Michigan Financial, seeks summary disposition with respect to all claims of the City. For the reasons stated more fully below, the Court will grant the City's motion and deny that of Michigan Financial.

The Detroit Building Authority (the DBA), a public entity incorporated under the Building Authority Act (the Act), MCL 123.951, *et seq.*, has acquired land and constructed several parking facilities in the City's downtown area. After acquisition, in compliance with the provisions of the Act, MCL 123.958, the DBA leased these properties to the City pursuant to supplements to the terms of a master lease known as Contract of Lease No. 2. One provision of these supplements was that the DBA would convey title to the City at the end of the lease term or at the conclusion of its financing.

In May 1997, the DBA purchased real property within the City's downtown district (hereinafter, the Property) from Fox Parking, Inc. The Warranty Deed memorializing the sale was duly recorded in June

1997. On the face of the Warranty Deed is a certification that there were no tax liens on the Property and that taxes were paid for the immediately preceding five years.

The Property consisted of two separately assessed tax parcels having separate street addresses: 612 First Street (otherwise referred to as the Subject Parcel) and 432 Congress Street. Both had separate City tax assessment roll item numbers, namely items 2300-15 and 153 respectively. In November 1997, a property transfer affidavit reflecting the transfer of title was filed with the City's Assessor, and additionally the DBA requested that the two tax parcels be combined under one address: 450 W. Congress. The documents provided to the Court concerning this administrative combination reflect that as of December 2, 1997, a search by tax number 2300-15 (i.e., the number for the Subject Parcel) would have revealed that the City's Municipal Parking Department (the Parking Department) was designated as the taxpayer of record. These records also clearly designate the Parking Department's address. By February 1998, the City's Assessor had processed the request for combining the two tax parcels into one parcel, one identified under the address 450 W. Congress.

At the time that the DBA purchased the Property, it only contained a surface parking lot. Desiring to improve the Property by the construction of a parking structure, DBA and the City entered into Supplement No. 4 to Contract of Lease No. 2, dated June 1, 1998. Under its terms, the construction costs for a high rise parking structure to be built on the property would be paid through the issuance of bonds by the DBA as well

as other funds paid by the City. Supplement No. 4, § 205. Supplement No. 4 also provided for the leasing to the City of the Property, and the improvements to it. Significantly, section 304 of Supplement No. 4 provided that the City's obligation to pay rent "shall not be a general obligation or debt of the city and shall not constitute a pledge or involve the faith and credit or taxing power of the City." Also, upon the expiration of the lease (no later than June 1, 2048, see Supplement No. 4, § 302) title in the Property would automatically vest in the City. See Supplement No. 4, § 305.

Thereafter, the DBA built on the Property a parking structure, commonly known as the Millennium Garage which was subsequently operated by the City's Parking Department. The Millennium Garage is situated on both of the former tax parcels, and as noted in the affidavit of Ronald Ruffin, ¶ 13, the Subject Parcel bisects a portion of the structure of the Millennium Garage.

On March 1, 2001, the Wayne County Treasurer forfeited the Subject Parcel for non payment of 1997 County taxes. The April 16, 2001 certificate of forfeiture recorded by the Treasurer listed the taxpayer of record as Samuel Salloum, the president of Fox Parking, Inc. The Treasurer did not list the City in any capacity on the certificate of forfeiture. According to an uncontested affidavit of Julie Castone, ¶ 10, the Treasurer did not attempt to review the City's records in preparing the foreclosure action for the Subject Parcel.

In the foreclosure action which followed, although the Treasurer served the DBA through certified mail with notice of the action, the Treasurer did not serve the City with notice of the foreclosure action. On November 24, 2001, a process server on behalf of the County Treasurer, visited the Subject Parcel. The affidavit of personal visit noted that the parcel was an occupied structure and further states that the affiant was not personally able to meet with the occupant and posted a notice of the foreclosure action "in a conspicuous manner on the property and a photograph of the property was taken." See Affidavit of Kenneth Tranor, attached as exhibit F to Michigan Financial's Second Motion for Summary Disposition.

The County also undertook to publish a notice of the foreclosure proceedings. The publication notice only refers to Salloum and the DBA. See, exhibit G, *supra*. On March 4, 2002, a judgment of foreclosure was entered (the Foreclosure Judgment). No appeal of the Foreclosure Judgment was filed. On September 26, 2002, the County offered the Subject Parcel for sale at an auction, at which point it was purchased by Michigan Financial.

On September 30, 2002, the DBA commenced this action seeking to set aside the Foreclosure Judgment In the meantime, according to the uncontested affidavit of Ronald Ruffin, ¶¶ 11-12, it was not until October 2, 2002 that the Parking Department first learned of the tax delinquency, and the City promptly sought leave of the Court to intervene. On November 1, 2002, the Court granted the City's motion to intervene. On November 14, 2002, the Treasurer

accepted payment of $4,395.19 from the City for any delinquent real property taxes.

At a May 30, 2003 hearing, the Court granted Michigan Financial's motion for partial summary disposition. In the meantime, on June 17, 2003, the City filed a motion for leave to file amended pleadings in the form of a cross and counterclaim under which it became aligned as a co-defendant along with Michigan Financial. On June 25, 2003, the Court entered an order formally granting Michigan Financial's motion for summary disposition with respect to the City's interest, and an order granting the City's motion for leave to file amended pleadings. Thereafter, on July 9, 2003, both the City and Michigan Financial moved for summary disposition on these additional claims.

Underlying the merits of the City's claims is its contention that the forfeiture, the Foreclosure Judgment, the sale of the Subject Parcel, and the previously issued order granting Michigan Financial's motion for summary disposition should be set aside because the County violated the City's right to due process by failing to give the City sufficient notice of the foreclosure proceedings and sale of the Subject Parcel.

2. Procedural Issues.

Preliminarily, the Court briefly addresses those procedural issues that Michigan Financial asserts preclude the Court from reaching the merits of the City's arguments. Initially, Michigan Financial contends that the Court lacks subject matter

jurisdiction over the City's cross-claim and counterclaim as a result of MCL 211.78l.

MCL 211.78l(1) and (2) provide,

> (1) If a judgment for foreclosure is entered under section 78k and all existing recorded and unrecorded interests in a parcel of property are extinguished as provided in section 78k, the owner of any extinguished recorded or unrecorded interest in that property who claims that he or she did not receive any notice required under this act shall not bring an action for possession of the property against any subsequent owner, but may only bring an action to recover monetary damages as provided in this section.
>
> (2) The court of claims has original and exclusive jurisdiction in any action to recover monetary damages under this section.
>
> (Emphasis added).

Michigan Financial argues that MCL 211.78l not only limits claims arising out of a failure to provide adequate notice to a money damages remedy, but also gives to the Court of Claims exclusive jurisdiction over these claims. This result, maintains Michigan Financial, is required under the intent behind the recent enactment of revisions to the statutes dealing with tax foreclosures and the plain language of MCL 211.78l. Moreover, Michigan Financial, relying on *Parkwood Ltd Dividend Housing Ass'n v State Housing Development Authority*, 468 Mich 763 (2003),

maintains that since the Court of Claims has exclusive jurisdiction to try claims for money damages under MCL 211.78l, it must also have exclusive jurisdiction to try non-monetary claims for relief, such as actions for declaratory judgment.

The City contends that MCL 211.78l does not apply to the present case for two reasons. First, the City observes that the literal language of the statute precludes its application to this case. For example, the City notes that the statute does not address claims based on a governmental agency's failure to *send* notice and that this case does not involve an action for possession. Also, the City argues that the statute cannot be construed in such a way as to apply to instances in which the governmental agency has violated the due process rights of an owner in failing to give the owner constitutionally sufficient notice of the foreclosure proceedings.

Neither of the parties, nor the Court in its own research, have uncovered case law construing the provisions of MCL 211.78l. Thus, the Court is left to apply this statute under the usual rules of statutory interpretation. In *People v Carpenter*, 464 Mich 223, 250 (2001), the Court noted,

> The first step in statutory interpretation is to give effect to the intent of the Legislature ... To do so, we examine first the specific language of the statute. If the language is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we will enforce the statute as written ... This Court should reject an interpretation of a statute that

speculates about Legislative intent and requires us to add language into the statute.

(Authorities omitted).

Moreover, it is a cardinal rule of statutory interpretation that "effect shall be given to every word, phrase, or clause of a statute." *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 757 (2002).

The court agrees with the City that the literal language of the statute does not permit its application in this case. Traditionally, there existed a distinction between equitable actions to quiet title, that is to determine interests in land, where the plaintiff was in actual possession of the property, and legal actions for ejectment, i.e., for possession, where the plaintiff was attempting not only to assert its superior title in the land, but also to oust another from the actual possession of the property in dispute. The Legislature ultimately combined these actions into one common action under the provisions of MCL 600.2932(1).[1] See generally, 2 Cameron, Michigan Real Property 2d, p. 1468; also see, 65 Am Jur 2d, Quieting Title and Determination of Adverse Claims, § 6. However, in MCL 211.78l(1) the Legislature, through the express language in that statute, has only referred to actions

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[1] MCL 600.2932(1) states, "Any person, whether he is in possession of the land in question or not, who claims any right in, title to, equitable title to, interest in, or right to possession of land, may bring an action in the circuit courts against any other person who claims or might claim any interest inconsistent with the interest claimed by the plaintiff, whether the defendant is in possession of the land or not."

for possession as being precluded. By not drafting MCL 211.78l to include all actions involving the determination of interests in the land, compare MCL 600.2932(1), the Legislature thus left unrestrained equitable actions to determine competing interests in the land where the alleged former owner still retained possession of the land. Moreover, the legislative scheme set forth in MCL 211.78l achieves a certain symmetry, namely the replacement of a legal action for possession with a legal action for damages. Mindful of the broad language of MCL 600.2932(1), undoubtedly had the Legislature meant to include equitable type actions to determine interests in land brought by former owners who still retain possession within the scope of MCR 211.781, and further substitute that equitable action with solely a legal action, the Legislature would have drafted the latter statute more broadly along the lines of MCL 660.2932(1).

In contrast, achieving the result desired by Michigan Financial would involve this Court not only in ignoring the impact of the Legislature's choice of language, namely not taking into account that the Legislature chose to limit the provisions of MCL 211.78l to actions for possession, but also in judicially rewording the statute to include actions to determine all interests in forfeited land, not merely those for possession. Of course, under the foregoing canons of legislative interpretation, the Court can neither disregard the language chosen by the Legislature nor add words to statutes.

In reaching this result, the Court rejects Michigan Financial's contention, under the holding of *Parkwood Ltd*, that the Court of Claims must have jurisdiction in

this case since the Legislature has given it jurisdiction in claims for damages under MCL 211.78l(2). *Parkwood Ltd* involved a construction of the jurisdictional provisions of MCL 691.6419. Based on the language of that statute that conferred exclusive subject matter jurisdiction on the Court of Claims for "*all* claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state" (emphasis added), the Court held that the jurisdiction of the Court of Claims was not limited to claims for damages, but could include equitable type claims, such as actions for declaratory judgment, so long as the claim was based on, *inter alia*, contract. *Id.*, 772-775. However, our case does not involve an action against the State. MCL 691.6419 does not control these proceedings. Moreover, as held above, the statute that Michigan Financial does invoke, MCL 211.78l, is one of limited application. Unlike the wording of MCL 691.6419, MCL 211.78l does not contain broadly encompassing language. Instead, its provisions are limited to actions for possession and actions for damages. Hence, the rationale of *Parkwood Ltd* does not apply to MCL 211.78l.

In addition, MCL 211.78l plainly *assumes* compliance with the remaining statutory provisions of the foreclosure "process, particularly the notice provisions. Accordingly, mindful that circuit courts "have original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court," MCL 600.605, this Court finds that the jurisdictional provisions of MCL 211.78l do not

apply to our case, and therefore, this Court possesses subject matter jurisdiction over the City's claims.[2]

Next, Michigan Financial maintains that the City lacks standing to pursue its claims because the interest of the record title holder, the DBA, was extinguished through the entry of the Foreclosure Judgment. Michigan Financial cites *Dolese v Bellows-Claude Neon Co.*, 261 Mich 57 (1932) in support of its argument as standing for the principle that lease rights of real estate tenants terminate upon the expiration of their landlord's rights of redemption.

However, the rule adopted by the Supreme Court in *Dolese*, involves the situation in which the mortgage that was foreclosed predated the lease. See for example, *Schaffer v Eighty-One Hundred Jefferson Ave East Corp*, 267 Mich 437, 447 (1934) (citing *Dolese* for the proposition that "subsequent lessees are not necessary parties to the foreclosure suit"). To the extent that the law of mortgage foreclosures can be applied to the law of tax foreclosures, *Dolese* would not

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[2] Given the result reached above, it is unnecessary to determine the constitutional question posed by the City. Hence, this Court abstains from resolution of whether MCL 211.78l could be applied in the situation in which a former owner, to whom the governmental agency had not provided constitutionally sufficient notice of the forfeiture, sought to regain possession of forfeited property. See, *J & J Construction Co v Bricklayers & Allied Craftsmen, Local I*, 468 Mich 722, 733 (2003) (courts do not unnecessarily decide constitutional issues). Nor need the Court determine whether there exists a conflict between MCL 211.78l and MCR 2.612 which grants authority to a circuit court to set aside a judgment.

apply to our case since the City's interest predated the foreclosure proceedings upon which Michigan Financial's interests depend. In any event, Michigan Financial fails to cite authority that applies *Dolese* to the situation of proceedings initiated by the government to forfeit property in which the governmental agency failed to give constitutionally required notice to those having significant property interests in the forfeited property. In light of the foregoing, this Court finds that the extinguishment of DBA'S interests in the Subject Parcel did not necessarily eliminate the City's interest.

Michigan Financial also contends that the City's cross and counter claims are procedurally deficient under MCR 2.612. Instead of the City filing these claims, Michigan Financial contends the City should have filed a claim of appeal with respect to the Court's June 25, 2003 order granting Michigan Financial's motion for partial summary disposition with respect to the interests of, *inter alia*, the City. In this regard, Michigan Financial contends the City's independent action to set aside the Foreclosure Judgment is untimely, under the authority of *Kiefer v Kiefer*, 212 Mich App 176 (1995), since more than a year had elapsed since the entry of the Foreclosure Judgment. Alternatively, Michigan Financial asserts that the City cannot establish the various requirements for maintaining independent actions under the authority of *Trost v Buckstop, Lure Co, Inc*, 249 Mich App 580, Iv den 467 Mich 862 (2002), including, *inter alia,* good cause for the failure to respond in a timely fashion.

In reviewing these arguments, the Court notes that the Court of Appeals in *Kiefer*, *supra*, 182, held, "the

one-year time limit [pertaining to motions for relief from judgment under MCR 2.612(C)(1),(2)] applies except when the plaintiff brings an independent action [under MCR 2.612(C)(3)] that claims either the plaintiff did not have actual notice or there was a fraud on the court."[3] In our case, the basis for the City's assertion that the Foreclosure Judgment should be vacated is precisely because the City lacked actual notice of those proceedings. Accordingly, Michigan Financial's timeliness argument fails. In any event, the time line established in the above statement of facts reflects that the City acted to preserve its rights in the Subject Parcel in an expeditious manner. Within a month of learning of the entry of the Foreclosure Judgment, the City had taken steps to successfully intervene in this case, and ultimately present its claim in its cross-claim and counterclaim.

Turning to Michigan Financial's reliance on *Trost*, in *Trost*, *supra*, 589, the Court of Appeals held,

> [F]ive essential elements must be satisfied for a party to be entitled to independent equitable relief: (1) the judgment is one that ought not, in equity and good conscience, be enforced, (2) there is a valid defense to the alleged cause of action on which the judgment is founded, (3)

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[3] Contrary to Michigan Financial's summary of *Kiefer's* holding, the Court of Appeals did not limit its holding to only instances where the claimant was asserting a lack of personal service. Instead, read in context, the Court in *Kiefer* was addressing instances in which the claimant was actually unaware of the action which led to the entry of the judgment or order that was at issue.

> fraud, accident, or mistake prevented the defendant from obtaining the benefit of the defense, (4) there was no negligence or fault on the part of the defendant, and (5) there is no adequate remedy available at law.

There is little doubt that, with respect to the entry of the Foreclosure Judgment, all of these elements are satisfied in light of the City's lack of actual notice of the foreclosure proceedings. The Court, therefore, also rejects Michigan Financial's contention that MCR 2.612(C)(3) does not provide the City with a procedural mechanism to set aside the Foreclosure Judgment and to seek an adjudication of its rights.

With respect to that part of the relief sought by the City that relates to setting aside this Court's previous grant of partial summary disposition to Michigan Financial as it pertains to the City's interest in the Subject Parcel, this Court notes that the arguments presently asserted by the City could have easily been presented to the Court through the procedural device of a motion for reconsideration under MCR 2.119(F), or a motion for relief from judgment under MCR 2.612(C)(1). Further, the Court notes its authority under MCR 2.604(A) to revise non-final orders in cases in which it retains jurisdiction. While the procedural mechanism of filing an independent action through the medium of a cross-claim or counterclaim may be unusual, nonetheless, at this point it would be an erroneous exaltation of form over substance in

contravention of MCR 1.105[4] to now hold, after the Court has previously granted leave to the City to file its cross-claim and counterclaim, that the City has chosen the wrong procedural vehicle to present all of its arguments that support its claim in this case.

Accordingly, the Court rejects Michigan Financial's contention that MCR 2.612(C)(3) does not afford the City a means for seeking relief in this case.

Lastly, Michigan Financial maintains that the City's claims are barred either by res judicata or collateral estoppel based on this Court's prior order in this case in which it granted Michigan Financial's motion for summary disposition. The short answer to this argument lies in the requirement that, for either res judicata or collateral estoppel to apply, the prior action or proceeding must have culminated in a valid final judgment. See, *Harvey v Harvey*, 237 Mich App 432, 436-437 (1999) ("Under the doctrine of res judicata, 'a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action'"); *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 341 (2002) (the doctrine of collateral estoppel prevents "relitigation of an issue in a subsequent, different cause of action between the same parties

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[4] MCR 1.105 states, "These rules are to be construed to secure the just, speedy, and economical determination of every action and to avoid the consequences of error that does not affect the substantial rights of the parties."

when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding"). Additionally, neither doctrine applies within a single action. *Harvey, supra*, 437; *Keywell, supra*. In this matter, the prior order of this Court granting Michigan Financial's motion for summary disposition was not a final order since it did not result in the adjudication of all claims. Also, the City's cross- claim and counterclaim were raised in the same proceeding. Accordingly, the Court finds that neither res judicata nor collateral estoppel bar the City's cross-claim or counterclaim.

3. The City's Claims.

A. Parties' Arguments.

The City contends that it is entitled to an extension of the period of redemption because the County violated the City's due process rights by failing to give to the City constitutionally sufficient notice of the pendency of the tax foreclosure proceedings. The City maintains it possessed a sufficient identifiable property interest that due process protects, and that the only means that the County used that might have given the City notice of the tax foreclosure proceedings, namely posting or publication, were constitutionally inadequate. Thus, the City contends the violation of its due process rights requires an extension of the redemption period.

Michigan Financial contends that at the time of the tax foreclosure proceedings, the interest of the City was not identifiable due to the City's having merged the Subject Parcel into a new street address and tax

number, and the City's asserted negligence in not having recorded its leasehold interest with the Wayne County Register of Deeds or cross referencing the new tax parcel number and address with the former tax parcel information. Furthermore, Michigan Financial also maintains that even if the City's interest was identifiable, the County's compliance with the statutory notice requirements reflects that what notice was given satisfied the City's due process rights. Finally, Michigan Financial argues that, even if the City's property rights in the Subject Property were taken in violation of its due process rights, there existed sufficient post-deprivation remedies insofar as the City could have availed itself of an opportunity to purchase the Subject Parcel prior to its being sold because the Subject Parcel was identified on a list of properties for sale by the County that had been provided to the City.

B. Analysis.

In Mullane v Central Hanover Bank & Trust Co., 339 US 306, 314; 70 S Ct 652; 94 L Ed 865 (1950), the Court recognized that prior to an action which will affect an interest in life, liberty, or property protected by the Due Process Clause of the Fourteenth Amendment, a State must provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." To analyze due process claims, courts first determine "[w]hether any procedural protections are due" and then decide "what process is due." *Dow v Michigan*, 396 Mich 192, 202 (1976), quoting from

Morrissey v Brewer, 408 US 471; 92 S Ct 2593; 33 L Ed 2d 484 (1972).

A determination of whether any procedural protections are due turns on whether the interest at issue is, *inter alia,* a property interest within the meaning of the Fourteenth Amendment. *Dow*, *supra*, 203. In *Dow*, *supra*, 204, n 19, the Court observed, quoting from *Board of Regents v Roth*, 408 US 564, 577; 92 S Ct 2701; 33 L Ed 2d 548 (1972), "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."

Courts have recognized a variety of real property interests that qualify for due process protection. In *Dow*, *supra*, 204, in the context of tax foreclosure proceedings, the Court held that the title holder to real property and the land contract vendees had significant interests in the property that lay within the protection of the Due Process Clause. A mortgagee's interest in real property was recognized as deserving of due process protections, again in the context of tax foreclosure proceedings, in *Mennonite Bd of Missions v Adams*, 462 US 791; 103 S Ct 2706; 77 L Ed 2d 180 (1983) after the Court noted that relevant state law gave mortgagees substantial rights in the property that could be conveyed or ripen into actual ownership and which had priority over subsequently accruing liens or claims. *Id*, 462 US 798.

In the present case, the City's rights in the Subject Parcel flow from both the provisions of the lease between itself and the DBA, and the unique relationship between a building authority and the incorporating municipality created by the Act. The lease gave the City actual possession of the Property, and indeed gave the City the right to operate the parking structure that was ultimately constructed on the Property. Also, as earlier recounted, the operative lease, as well as MCL 123.958, required the DBA to deed over to the City title to the Property (including the Subject Parcel) at the conclusion of specified occurrences, and in any event no later than fifty years from the date of the lease or the issuance of the refunding. Thus, the City not only acquired a present possessory interest in the Subject Parcel, but also held what appears to be a vested future ownership interest in the Subject Parcel. Although there is no authority that speaks to the exact issue before the Court, the situation in the present case is sufficiently akin to the land contract vendees in *Dow* and the mortgagee in *Mennonite Bd of Missions*, insofar as the City's interests in the Subject Parcel is one created and recognized under Michigan law. Accordingly, the Court finds that the City's interest in the Subject Parcel was a significant property interest entitled to due process protection, and, hence, entitled to notice reasonably calculated to apprise it of the pending tax foreclosure proceedings.

Having concluded that the City had a property interest subject to due process protection, the next step in the Court's analysis is to determine "what process is due." *Dow*, *supra*. The Court in *Dow*, *supra*, 204, 205, observed that "due process is flexible and calls for

such procedural protections as the particular situation demands," but went on to note that "the fundamental requisite of due process of law is the opportunity to be heard ... [and that] the opportunity to be heard includes the right to notice of that opportunity ... While the form and nature of the hearing can vary, the Due Process Clause secures an absolute right to an opportunity for a meaningful hearing before the termination becomes effective." (Authorities omitted). At a minimum, notice is sufficient for purposes of due process when the notice is reasonably calculated under all of the circumstances to apprise the interested parties of the pendency of the action and afford them an opportunity to present their objections. *Mullane*, *supra*, 314.[5]

An "identifiable interest" is usually associated with a recorded interest or an interest that is obvious via actual possession. *Lobato v Taylor*, 70 P3d 1152, 1161 (Colo, 2003); also see *Dow*, *supra*, 210 (noting that ordinarily a land contract purchaser of a residence who is in actual possession is "readily identifiable").

If the state exerts reasonable efforts, then failure to effectuate actual notice does not preclude foreclosure of a statutory lien. *Dow*, *supra*, 211. Our Supreme Court recently held that compliance with the notice

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[5] *Robulus v American State Bank*, 258 Mich 21 (1932), a case cited by Michigan Financial, is not controlling. First, *Robulus* did not involve tax foreclosure, and hence state action, but instead foreclosure of a mortgage through advertisement. Also, to the extent that *Robulus* is applicable to the law of tax foreclosure, it no longer constitutes controlling authority in light of *Dow* and *Mennonite Bd of Missions*.

provisions of the formerly effective provisions of the Michigan General Property Tax Act (the GPTA), which included sending a notice to the last known address of a corporate record title holder through certified or registered mail, return receipt requested, satisfies the notice requirements of due process, even if the notice is returned undeliverable to that address, at least in the situation where the record title holder does not occupy the premises, and there is no indication that the foreclosing authority had actual knowledge of the address of the corporation, comports with due process. *Smith v Cliffs on the Bay Condominium Assn*, 463 Mich 420, 427 (2000).[6]

Due process requires *strict compliance* with the statutory notice provisions. *Brandon Twp v. Tomkow*, 211 Mich App 275 (1995); *Andre v Fink*, 180 Mich App 403 (1989); *Stein v Hemminger*, 165 Mich App 678 (1988) lv. den., 430 Mich 896 (1988).

The GPTA, MCL 211.78i (§ 78i), presently specifies what steps a foreclosing unit of government must take to notify owners of an interest in the parcel to before closed of the pendency of foreclosure proceedings. Among other measures, the foreclosing unit of government must "initiate a title search to identify the owners of a property interest in the property," "determine the address reasonably calculated to apprise those owners of a property interest" of the

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[6] The Court in *Smith*, *supra*, 427, expressly noted that in *Dow* the Court was confronted with the situation where the governmental agency made no attempts to serve the interested party through certified mail.

pendency of the foreclosure proceedings, and send notice via certified mail, return receipt requested, to those owners of the pendency of the foreclosure proceedings. § 78i(1), (2).

Also, pursuant to § 78i(6), the foreclosing unit of government is also required to notify an owner of a property interest in the property if that interest is identifiable by reference to any of the following sources:

(a) Records in the office of the county register of deeds.

(b) Tax records in the office of the county treasurer.

(c) Records in the office of the local assessor.

(d) Records in the office of the local treasurer.

Additionally, the foreclosing unit of government must "make a personal visit to each parcel of property forfeited to the county treasurer ... to ascertain whether or not the property is occupied," and, if so, *inter alia,* "[a]ttempt to personally serve upon a person occupying the property notice of the show cause hearing ..." § 78i(3)(a). However, if the foreclosing governmental unit "is not able to personally meet with the occupant," the foreclosing governmental unit is required to post a notice of the foreclosure proceeding in a conspicuous manner on the property as directed under § 78i(3)(d).

Finally, § 78i(5) authorizes publication as a permissible means of notice only if the foreclosing unit of government "is unable to ascertain the address reasonably calculated to apprise the owner of a property interest entitled to notice under this section, or is unable to serve the owner of a property interest."

In comparing the provisions of the GPTA with the principles flowing from *Dow* and *Mennonite Bd of Missions*, it is evident that compliance with the provisions of the GPTA would likely satisfy any due process notification requirements. Indeed, the present requirements of the GPTA are more elaborate than those reviewed by the Court in *Smith*, *supra*. Thus, fulfilling the requirements of the GPTA would likely shield the foreclosing unit of government from a due process challenge to the validity of the foreclosure judgment and subsequent sale of the property. *Smith*, *supra*.

In the present case, several factors lead this Court to find that the County did not strictly comply with the statutory notice provisions of § 78i, and did not therefore satisfy constitutional due process requirements to provide notice.

First, it is now undisputed that the County failed to review the records of the City's Assessor or Treasurer. Therefore, the County failed to comply with the requirements of § 78i(6)(c) and (d), and thereby failed to avail itself of a ready means of ascertaining the City's interest in the matter, since the Assessor or the Treasurer's records would have revealed that the City was the taxpayer of record.

Michigan Financial asserts, that the County's failure to make an inquiry into the records of the City's Assessor and Treasurer should be excused because, assertedly, a search of these records would not have, in fact, revealed the City's interest. To support this conclusion, Michigan Financial relies on the affidavit of O'Malley[7], who attests that upon his inquiry, neither the City's Treasurer nor the City's Assessor could locate the Subject Parcel under its former address and tax number. See O'Malley Affidavit, attached as exhibit A to Michigan Financial's Second Motion for Summary Disposition. However, the Court does not find O'Malley's statements, even if true, to be conclusive. O'Malley's affidavit does not reveal whether he disclosed the purpose of his inquiry or the extent to which he sought to have the Treasurer or Assessor identify the current tax parcel number or address for the Subject Parcel. Nor could O'Malley give any testimony of what the County might have ascertained had it complied with its duty to make an inquiry of the City's Assessor and Treasurer's offices several years ago.

Although it may be that the address of 612 First Street and item number 2003-15 are not presently located on the City's computerized record of its current tax roll, it does not follow that an inquiry to the City's Assessor and Treasurer would have been futile as suggested by Michigan Financial. The records produced by the City in support of its motion demonstrate that an inquiry into the City's archival

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[7] The affidavit of O'Malley contains no reference to O'Malley's first name.

records would have, in fact, uncovered not only the existence of such an address, but also the City's interest in that parcel. In short, the Court does not find that there exists a sufficient basis for excusing the County's failure to comply with the requirements of § 78i(6)(c) and (d). Instead, the Court finds that the existence of the fact that the City had an interest in the Subject Parcel would have been revealed by inquiry to the City's Assessor and Treasurer.[8]

Additionally, the Court finds that the County failed to comply with the requirements of § 78i(3). The undisputed facts show that the County, in its efforts to comply with the personal visit requirements of § 78i(3), only visited the Subject Parcel on one day, November 24, 2001. As noted in the City's Supplemental Brief, p 7, November 24, 2001 fell on a Saturday, a day on which the Millennium Garage was ordinarily closed. Therefore, it is not surprising that, at least on that day, the County's process server was unable to serve notice of the pendency of the foreclosure proceedings on a person present on the premises, since the premises were closed for business. In construing the requirements of § 78i(3), this Court is mindful of the rationale of *Smith*, *supra*, that the provisions of § 78i represent the Legislature's attempt to comply with the due process requirements enunciated under past court decisions, such as *Dow*. As noted earlier, one of the hallmarks of the notice

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[8] At one point, Michigan Financial contended that the combination of the two parcels was illegal. However, the ordinance cited by Michigan Financial on this issue, City Ordinance § 51-2-7, facially applies only to divisions of property – not their combination.

requirement of due process is that notice must be served in a manner reasonably calculated to apprise a person of the pendency of some hearing. *Mullane*, *supra*, 314. Visiting property for the purpose of attempting to personally serve the occupant on a day, such as a Saturday, on which its business is closed, and when none of the employees may be present, can hardly be said to be a measure calculated to effectuate this purpose or to apprise the business of the pendency of a hearing.[9] Indeed, having only visited the premises on day when the Millennium Parking structure was closed, the process server could not have legitimately concluded that he was "not able to personally meet with the occupant," for purposes of § 78i(3). Thus, the County could not satisfy its obligation to provide the City with notice through posting under § 78i(3).

The only other method by which the County attempted to notify the City of the pendency of the foreclosure proceedings was through publication. Under § 78i(5), the County could utilize this method only if the County was "unable to ascertain the address reasonably calculated to apprise the owners of a property interest entitled to notice under this section, or is unable to serve the owner of a property interest." However, as previously noted, the City's interest was readily identifiable through the records of

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[9] Although not controlling, ths Court is additionally guided by case law that holds a party is not entitled to effectuate service on a defendant through means of substituted service where the only attempts made at personal service were at places or times when the defendant would likely not be either at home or at his or her place of business. See for example, *Sartor v Utica Taxi Ctr, Inc*, 260 F Supp 2d 670, 673-674 (SD NY, 2003) (discussing cases).

the City's Treasurer or Assessor. Also, it is significant that the County at some point became aware of the interest of the DBA in the property. This fact should have also alerted the County to the interest of the City, since by statute, property owned by a building authority is subject to being leased to the incorporating municipality in whose name title to the property ultimately will vest. See MCL 123.958.

Beyond the foregoing considerations, the strongest indicator that the City's interest was easily identifiable was that it was in actual possession of the Millennium Garage. See, *Dow*, *supra*. Because the City actually occupied, and indeed operated the Millennium Garage through the City's Parking Department, had the County made a reasonable attempt to visit the Millennium Garage for the purpose of making personal contact with someone who worked there, i.e, during weekdays and normal business hours when the Garage was actually open for business and employees were present, there is little doubt that the City's interest could have been easily discovered, and, in turn, its address readily ascertained.

For all of these reasons, the Court finds that the County was not entitled to effectuate notice through publication under § 78i(5).

Finding that the County did not comply with the provisions of § 78i further warrants this Court to conclude that the City's due process right to notice of the pendency of the foreclosure proceedings was violated. Since the interest of the City in the Subject Parcel was readily identifiable either through a search of the records of the City's Treasurer or Assessor, or

due to the City's actual occupancy of the Subject Parcel, under *Dow* and *Mennonite Bd of Missions*, the County was obligated to make reasonable attempts to notify the City of the pendency of the foreclosure proceedings. Yet, the record before the Court reflects that the County failed to give the City constitutionally sufficient notice. While it may be that the County provided the DBA with notice through a certified mailing, given that the DBA and the City are distinct legal entities, it must follow that notice to the DBA did not provide notice to the City. *Mennonite Bd of Missions, supra.*

Unlike the situation in *Smith,* a case relied on by Michigan Financial, the County did not comply with the provisions of the GPTA. Although there was an attempt to make personal contact with an occupant of the Millennium Garage, as explained above, under the circumstances, the attempt was made in a manner not calculated to apprise the occupant of the pendency of the foreclosure proceedings, and, hence, was insufficient under *Mullane, supra.* Also, the County attempted notice through posting and publication. Given the identifiable interest of the City in the Subject Property, however, neither of these means were constitutionally sanctioned. See, *Dow, supra,* and *Mennonite Bd of Missions, supra.* Thus, it follows that the County violated the City's right to due process.

In reaching this conclusion, the Court notes that the present case is distinguishable from *Detroit v Adamo,* 466 Mich 890 (2002), and *Immoboliare. Inc v City of Detroit,* unpublished opinion per curiam of the Court of Appeals, decided May 29, 2003 (Docket No. 237743), heavily relied on by Michigan Financial in its

supplemental briefs, wherein it was held, under the previous version of the GPTA, that the foreclosing unit of government was not required to send out notices of foreclosure simultaneously to all owners of property interests, but instead could terminate rights in a piecemeal fashion. While this line of cases might have some impact on the DBA's right to redeem, the resolution of that question does not affect the determination of the City's rights in the Subject Property. Unlike the situation in *Adamo* and *Immoboliare*, the City's rights in the Subject Property predated the foreclosure proceedings. Thus, regardless of whether the County could have extinguished the DBA's rights in the Subject Parcel in a piecemeal fashion, as discussed above, in order to terminate the City's independent rights in the Subject Property, the County was required to afford the City its due process rights to notice.

Having found that the County violated the City's due process rights to notice of the pendency of the foreclosure proceedings, the Court lastly considers Michigan Financial's alternative contention that the City had sufficient post-deprivation remedies. The factual basis for this contention rests on the fact that the County sent to the City a list of properties that had been subject to tax foreclosure that would be sold. Michigan Financial argues that providing the City with this list gave the City a "golden opportunity" to redeem the Subject Parcel. There are several problems with this argument. First, the notice to the City did not clearly state that any of the properties included property in which the City had an ownership interest. Second, the address used by the County had long been out of date, and thus did not afford the City with notice

that the Subject Parcel was about to be sold. Hence, whatever else this notice might have provided, it was not reasonably calculated to apprise the City that its interest in the Subject Parcel was about to be lost, and thus cannot be deemed to be an "adequate" post-deprivation remedy.

In any event, the legal premise behind Michigan Financial's invocation of the adequate post-deprivation remedies undercuts the usefulness of that concept in our case. As summarized in *Harris v City of Akron*, 20 F3d 1396, 1401 (CA 6), *cert den*, 513 US 1001; 115 S.Ct 512; 130 L Ed 2d 419 (1994),

> ... in some situations a state may satisfy procedural due process by providing "some meaningful means by which to assess the propriety of the State's action at some time after the initial taking." .... When the situation necessitates "quick action" by the state or makes efforts to provide a meaningful predeprivation process impracticable, the persons acting under state authority may proceed without violating the property owner's rights so long as the state provides an adequate postdeprivation procedure ... Such a procedure satisfies the "fundamental requirement of due process" - an opportunity to be heard "at a meaningful time and in a meaningful manner."
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> (Authorities omitted).

In our case, Michigan Financial has not demonstrated any circumstance that required the County to take "quick action" or otherwise would have

made predeprivation process impracticable. Accordingly, Michigan Financial's invocation of the adequacy of post- deprivation remedies is legally unsound.

4. Conclusion.

For all the foregoing reasons, the Court agrees with the City that the County failed to accord the City its due process as well as its statutory rights to notice of the foreclosure proceedings.[10] The typical remedy for such a violation is that the former owner's redemption rights remain intact and any deed issued by the foreclosing authority remains subject to the former owner's exercising its redemption rights. *City of Flint v Takacs*, 181 Mich App 732, 740 (1989); *Brandon Twp v Tomkow*, 211 Mich App 275, 284 (1995), *lv den*, 452 Mich 857 (1996). Further, this remedy flows from the admonition of the Court in *Dow*, 205, that the Due Process Clause "secures an absolute right to an opportunity for a meaningful hearing 'before the termination becomes effective.'" Finally, given the finding that the City was not accorded due process, this result is contemplated by the current version of

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[10] Resolution of the City's due process arguments moots consideration of whether the County Treasurer was empowered, *sua sponte*, to revoke the sale of the Subject Parcel under the authority of a certain State Tax Commission Bulletin issued in April 2002. Hence, the Court does not address the arguments of the parties concerning the application of the Bulletin to properties already subject to a tax foreclosure judgment.

the GPTA. See MCL 211.78i(2).[11] Thus, typically a court in fashioning a remedy would provide an appropriate period of time in which the former owner could exercise its right to redemption. However, in our case, since the City has already tendered to the County the redemption price, there is no further need to provide for a redemption period. Instead, the City is entitled to a declaration setting aside the Foreclosure Judgment, and the sale of the Subject Parcel to Michigan Financial, and that part of this Court's previously issued order granting summary disposition against the City. Finally, as noted earlier, the City also sought summary disposition with respect to the remainder of Michigan Financial's claims based on the assertion that a finding in the City's favor on its due process claim would moot or render untenable the remainder of Michigan Financial's claims. Michigan Financial has not taken issue or otherwise shown how its remaining claims could survive should this Court find that the City's due process rights were violated. Accordingly, the Court will also grant that part of the City's motion that seeks summary disposition with respect to the remainder of Michigan Financial's claims. As soon as practicable after the issuance of this

---

[11] MCL 211.78i(2) states in pertinent part, "The failure of the foreclosing governmental unit to comply with any provision of this section shall not invalidate any proceeding under this act *if* the owner of a property interest or a person to whom a tax deed was issued is accorded the minimum due process required under the state constitution ... and the constitution of the United States." (Emphasis added). In our case, because the City was not accorded its due process rights, this part of § 78i implicitly authorizes the invalidation of tax foreclosure proceedings where an owner of a property is *not* accorded its due process rights.

Opinion, the City shall file with the Court and the parties an Order for entry by the Court which conforms to this Opinion.[12]

/s/ Mary Beth Kelly
Hon. Mary Beth Kelly
Circuit Judge

DATED: DEC 01 2003

[12] At this point, it would appear to the Court that no further issues remain to be adjudicated in this case. Therefore, the Order that is to be entered based on this Opinion should be regarded as a final order.

APPENDIX D

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF WAYNE

No. 02-234701-CH

[Filed June 25, 2003]

THE CITY OF DETROIT BUILDING AUTHORITY, a Michigan public body corporate,
Plaintiff,

vs.

WAYNE COUNTY TREASURER,
Defendant,

and

MICHIGAN FINANCIAL INVESTMENTS, L.L.C., a Michigan limited liability company,
Intervening Defendant,

and

MICHIGAN FINANCIAL INVESTMENTS, L.L.C., a Michigan limited liability company,
Cross-Plaintiff,

vs.)
)
WAYNE COUNTY TREASURER; THE)
CITY OF DETROIT BUILDING)
AUTHORITY and THE CITY OF DETROIT,)
Cross-Defendants.)
)

DAVID N. ZACKS (P34192)
REBECCA SHAW-HICKS (P40732)
LEWIS & MUNDAY, P.C.
Attorneys for THE CITY OF DETROIT
BUILDING AUTHORITY
1300 First National Building
660 Woodward Avenue
Detroit, MI 48226
(313) 961-2550

BARRY A. STEINWAY (P24137)
THAV, GROSS, STEINWAY & BENNETT PC
Attorneys for MICHIGAN FINANCIAL
30150 Telegraph Road, Suite 444
Bingham Farms, MI 48025
(248) 645-8202
(248) 331-1002

TERRANCE A. KEITH (P27738)
Assistant Corporation Counsel
Attorney for WAYNE COUNTY TREASURER
600 Randolph Street, Suite 253
Detroit, MI 48226
(313) 224-6107
(313) 224-4882 (Fax)

JAMES D. NOSEDA (P52563)
City of Detroit Law Department
Attorneys for CITY OF DETROIT
1650 First National Building
Detroit, MI 48226
(313) 237-3057
(313) 224-5505

ORDER GRANTING PARTIAL SUMMARY DISPOSITION IN FAVOR OF CROSS-PLAINTIFF, MICHIGAN FINANCIAL INVESTMENTS, L.L.C.

At a session of said Court, held in
the City of Detroit, County of Wayne,
State of Michigan on JUN 25, 2003

PRESENT: HON. MARY BETH KELLY
MARY BETH KELLY
CIRCUIT COUT JUDGE

This matter having come on for hearing before this Court on May 30, 2003, on Cross-Plaintiff, Michigan Financial Investments, L.L.C.'s (**"MFI"**) Motion for Partial Summary Disposition; the Court having reviewed the Briefs and Transcript of the hearing of April 17, 2003, and being otherwise fully advised in the premises;

NOW, THEREFORE, IT IS HEREBY ORDERED that Partial Summary Disposition is granted under MCR 2.116(C)(9) and (10) in favor of MFI and against Cross-Defendants, Wayne County Treasurer (**"Treasurer"**), The City of Detroit Building Authority

("**Building Authority**") and The City of Detroit ("**City**"), as follows:

1. MFI is granted specific performance under Count II of MFI's First Amended Cross-Claim, such that the Treasurer shall execute and deliver to MFI, a Quit Claim Deed to the Subject Property, located in the City of Detroit, County of Wayne, State of Michigan, more particularly described on **Exhibit "A"** attached hereto and made a part hereof, commonly known as 612 First Street, Tax Parcel No. 02-002300-15 ("**Subject Property**").

2. MFI is granted a Judgment for Declaratory Relief, under Count III of its First Amended Cross-Claim. In accordance with the requirements of MCL 211.78k, the interests of the City, the Building Authority and The City of Detroit Municipal Parking Department ("**Municipal Parking Department**") in and to the Subject Property, were extinguished.

3. Any prior Order restraining the issuance of a Deed by the Treasurer for the subject property to Michigan Financial is vacated.

4. This Order does not resolve the last pending claim nor closes the case. Rather, this matter shall proceed forward in regard to MFI's claims under Count I against the Treasurer for damages, under Count V for an accounting and money judgment against the Building Authority and Municipal Parking Department, and under Count VI for receiver and injunctive relief against the Building Authority and Municipal Parking Department.

MARY BETH KELLY
MARY BETH KELLY
CIRCUIT COURT JUDGE

A TRUE COPY
CATHY M. GARRETT
WAYNE COUNTY CLERK

BY /s/
DEPUTY CLERK

APPENDIX E

STATE OF MICHIGAN
IN THE THIRD JUDICIAL CIRCUIT COURT
COUNTY OF WAYNE

No. 01-120001-PZ

[Filed March 4, 2002]

In the Matter of the Petition	)
Of the Treasurer for the County of Wayne,	)
State of Michigan, for the Foreclosure	)
Of Certain Lands for Unpaid Property Taxes.	)
	)

JUDGMENT OF FORECLOSURE

At a Session of this Court held at the
Court house in the City of Detroit
on the MAR 04 2002 day of March 2002, A.D.

Present : Hon. Mary Beth Kelly, Circuit Judge

The Treasurer for the County of Wayne shows unto this Honorable Court that:

This matter was initiated with the filing of a Petition for Foreclosure on June 14, 2001.

The Petition identified parcels of property forfeited to the Wayne County Treasurer uuder MCL 211.78g

for the 1999 and prior years taxes and set forth the amount of the unpaid delinquent taxes, interest, penalties and fees for which each parcel of the property was forfeited. The Petition sought a judgment in favor of petitioner Wayne County Treasurer for the forfeited unpaid delinquent taxes, interest, fees and penalties listed against each parcel of property. The Petition further sought a judgment vesting absolute title to each property in the petitioner, without right of redemption, as to parcels of property not redeemed within 21 days after entry of a judgment.

Before the date of the hearing on the Petition, petitioner filed with the clerk of the court proof of the notice, service or publication required under the General Property Tax Act, P.A. 206 of 1893, as amended, MCL 211.1 et seq.

A hearing on the petition and objections thereto was held on February 27, 2002, at which time all parties interested in the forfeited properties were heard.

The court finds that all those entitled to notice and an opportunityto be heard have been provided that notice and opportunity.

THEREFORE IT IS ORDERED:

a. The amount of the forfeited delinquent taxes, interest, penalties, and fees set forth in the list of foreclosed property attached to this judgment are valid and judgment of foreclosure is entered in favor of the Wayne County Treasurer against each parcel of property for payment of the amount set

out against the parcel including all charges for interest or fees that have accrued until the date of this judgment since the filing of the Petition on June 14, 2001.

b. Fee simple title to each parcel foreclosed upon the judgment will vest absolutely in the Petitioner, without any further rights of redemption, if all the forfeited delinquent taxes, interest, penalties and fees foreclose against the parcel are not paid to the County Treasurer within 21 days after entry of this judgment.

c. All liens against the property, except for future installments of special assessments and liens recorded by this state or the foreclosing governmental unit pursuant to the natural resources and environmental protection act, 1994 PA 451, MCL 324.101 to 324.90106 are extinguished, if all the forfeited delinquent taxes, interest, penalties and fees are not paid within 21 days after entry of the judgment;

d. The Wayne County Treasurer has good and marketable fee simple title to the property, if all the forfeited delinquent taxes, interest, penalties and fees are not paid within 21 days after entry of the judgment;

e. All existing recorded and unrecorded interests in the property are extinguished, except a visible or recorded easement or right-of-way, private deed restrictions, or restrictions or other governmental interests, imposed pursuant to the natural resources and environmental protection act 1994

PA 451, MCL 324.101 to 324.90106, if all the forfeited delinquent taxes, interest penalties, and fees are not paid within 21 days after entry of the judgment;

f. Properties listed on the Petition filed in this matter on June 14, 2001 which are not foreclosed by this judgment and on which delinquent taxes, fees, penalties and fees remain unpaid and which are not ordered permanently removed remain subject to future foreclosure proceedings by the foreclosing governmental unit as provided MCL 211.78. The removal of a property from the Petition filed June 14, 2001 shall not be prejudicial to its inclusion on any future petition for tax foreclosure filed pursuant to Public Act 123 of 1999, as amended.

MARY BETH KELLY
Circuit Court Judge

A TRUE COPY
CATHY M. GARRETT
WAYNE COUNTY CLERK

BY /s/
DEPUTY CLERK

APPENDIX F

Supreme Court of Michigan

SC: 129743
COA: 253479
Wayne CC: 02-234701-CH

[Filed March 24, 2008]

DETROIT BUILDING AUTHORITY,
Plaintiff/Cross Defendant-Appellee,

and

CITY OF DETROIT,
Intervening Plaintiff/Counter Plaintiff/Cross Plaintiff-Appellee,

v.

WAYNE COUNTY TREASURER,
Defendant/Cross Defendant/ Counter Defendant-Appellee,

and

MICHIGAN FINANCIAL INVESTMENTS, L.L.C.,
Intervening Defendant/Cross Plaintiff/ Counter Defendant-Appellant.

On order of the Court, the motion for reconsideration of this Court's September 28, 2007 order is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

[Seal of the Michigan Supreme Court Lansing]

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 24, 2008 /s/ Corbin R. Davis
Clerk

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(3)

No. 07-1605

FILED
JUL 24 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

MICHIGAN FINANCIAL INVESTMENTS, L.L.C.,

Petitioner,

v.

DETROIT BUILDING AUTHORITY, CITY OF DETROIT, WAYNE COUNTY TREASURER,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Michigan

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LINDA FEGINS
Counsel of Record
JOANNE D. STAFFORD
Counsel for Respondent City of Detroit
660 Woodward, Ste. 1650
Detroit, MI 48226
(313) 237-3069

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THIS COURT HAS JURISDICTION UNDER 28 U.S.C. § 1257 TO REVIEW PETITIONER'S FOURTEENTH AMENDMENT DUE PROCESS VIOLATION CLAIM WHERE PETITIONER FAILED TO PROPERLY PRESENT THIS CLAIM TO THE STATE COURTS AND THE STATE COURTS FAILED TO DECIDE THIS ISSUE?

2. WHETHER PETITION LACKS STANDING WHERE IT SEEKS TO ASSERT THE ALLEGED FOURTEENTH AMENDMENT RIGHTS OF THE WAYNE COUNTY TREASURER AND NOT ITS OWN FOURTEENTH AMENDMENT RIGHTS?

3. WHETHER PETITIONER HAS SHOWN ANY VIOLATION OF ITS OWN FOURTEENTH AMENDMENT DUE PROCESS RIGHTS, WHERE THE MICHIGAN SUPREME COURT RELIED ON AN APRIL 2002 RULE PROMULGATED BY THE MICHIGAN STATE TAX COMMISSION, PROHIBITING THE FORECLOSURE OF PROPERTY OWNED BY A GOVERNMENTAL ENTITY, TO PRECLUDE PETITIONER FROM OBTAINING THE PROPERTY IN A PUBLIC AUCTION FIVE MONTHS LATER?

4. WHETHER PETITIONER HAS WAIVED ANY DEPRIVATION OF DUE PROCESS CLAIM?

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW – Continued

5. WHETHER PETITIONER HAS SHOWN THAT THE FEDERAL DUE PROCESS RIGHTS OF THE TREASURER WERE VIOLATED?

6. WHETHER THERE WAS AN ALTERNATIVE AND INDEPENDENT GROUND TO SUSTAIN THE TRIAL COURT'S JUDGMENT?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent City of Detroit is a Michigan municipal corporation which has no parent company and no corporate stock.

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COURT RULES

Sup. Ct. R. 10 15

CITATIONS OF THE OFFICIAL AND UNOFFICIAL OPINIONS AND ORDERS ENTERED IN THE CASE BY THE LOWER COURT

The list of lower court citations set forth at page 1 of the Petition is correct.

COUNTER-STATEMENT OF JURISDICTION

The procedural history of the case appearing at page one of the Petition is correct. However, Respondent City of Detroit submits that this Court does not have federal question jurisdiction under 28 U.S.C. § 1257(a). Respondent submits that the purported federal question posed in the Petition for Writ of Certiorari did not arise in the record below. Petitioner failed to raise the one federal claim that it now presents to this Court prior to the Michigan Supreme Court's summary order of September 28, 2007. The Michigan Supreme Court failed to rule on that issue in that order or in its order denying rehearing.

In the state courts, Petitioner Michigan Financial Investments, L.L.C. asserted no express violation of its own rights protected by the Fourteenth Amendment to the United States Constitution, and no express violation of the due process rights of the Wayne County Treasurer under the Fourteenth Amendment, prior to the Michigan Supreme Court's peremptory decision of September 28, 2007. Petitioner's pleadings and other filings contained no

reference to the Fourteenth Amendment to the United States Constitution or even to the counterpart due process clause of the 1963 Michigan Constitution.

In its order summarily disposing of the case, the Michigan Supreme Court did not mention or discuss the Fourteenth Amendment to the federal Constitution, or the term due process of law. The federal question now posed by Petitioner was also not decided in the Michigan Supreme Court's order denying the Petitioner's motion for rehearing, which was entered on March, 2008. Under these circumstances, federal question jurisdiction is wanting. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181, n. 3 (1983); *Webb v. Webb*, 451 U.S. 493, 497-500 (1981); *Cardinale v. Louisiana*, 394 U.S. 437, 438-439 (1969); *Gibbes v. Zimmerman*, 290 U.S. 326, 328 (1933).

To the extent that this presentation requirement is deemed as prudential, rather than jurisdictional, the petition should be denied for Petitioner's failure to met its burden of showing that the federal issue posed was properly presented in the state court. *Howell v. Mississippi*, 543 U.S. 440, 443-445 (2005).

CONSTITUTIONAL PROVISION, STATUTE AND REGULATION INVOLVED

The Fourteenth Amendment to the United States Constitution

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Mich. Comp. Laws § 211.78g(1)

Except as otherwise provided in this subsection, on March 1 in each tax year, certified abandoned property and property that is delinquent for taxes, interest, penalties, and fees for the immediately preceding 12 months or more is forfeited to the county treasurer for the total amount of those unpaid delinquent taxes, interest, penalties, and fees. If property is forfeited to a county treasurer under this subsection, the foreclosing governmental unit does not have a right to possession of the property until the April 1 immediately succeeding the entry of a judgment foreclosing the property under section 78k or in a contested case until 22 days after the entry of a judgment foreclosing the property under section 78k. If property is forfeited to a county treasurer under this subsection, the county treasurer shall add a $175.00 fee to each parcel of property for which those delinquent taxes, interest, penalties, and fees remain unpaid. A county treasurer shall withhold a parcel of property from forfeiture for any reason determined by the state tax commission. The procedure for withholding a parcel of property from forfeiture under this

subsection shall be determined by the state tax commission.

Michigan State Tax Commission Bulletin
Dated April 17, 2002

Reasons to Withhold a Parcel of Property From Forfeiture and Procedures for Withholding a Property From Forfeiture.

The State Tax Commission, at its meeting on April 17, 2002, determined that the following are the reasons that a parcel of property shall be withheld from forfeiture:

* * *

2) A property owned by the U.S. Government, the State of Michigan, a county, a city, a village or a township shall be withheld from forfeiture.

Procedure: If the property is forfeited in error, the County Treasure removes all of the fees attached to the parcel, files a certificate of cancellation of forfeiture (form 3839) with the Register of Deeds. Notifies the State Treasurer and the contractor of the error. The State Treasurer will withhold the parcel from foreclosure and stop all title work on the parcel.

COUNTER-STATEMENT OF THE CASE

As required by the Michigan Building Authority Act, 1948 Mich. Pub. Acts 31 as amended, Mich. Comp. Laws § 123.954, the Detroit Building Authority (hereinafter referred to as DBA) has acquired, constructed, and leased parking facilities to the City of Detroit via supplements to a 1985 master lease known as Contract of Lease No. 2. As required by the Act, it will convey title to the facilities to the City at the end of the lease term or at the conclusion of its financing. *See* Mich. Comp. Laws § 123.958; Mich. Comp. Laws § 123.963. Under its lease and the Act, the City is the residual and beneficial owner of the leased properties. It enjoys a vested future interest in the properties.

On May 29, 1997, the DBA purchased property from Fox Parking for the price of three million dollars. When acquired by the DBA, the property was comprised of two lots and contained a surface parking lot. The DBA recorded the deed to the two lots in the Wayne County Register of Deeds' Office on June 25, 1997. The recorded deed provided two distinct, full legal descriptions, with two respective street address and local property tax identification numbers. The Wayne County Register of Deeds was required by Mich. Comp. Laws § 211.27a(8) to notify the assessor of the local taxing authority of the conveyance and make the deed available to Wayne County's tax equalization department within 30 days of the recording.

After it purchased the property, the DBA supplied the City of Detroit Assessor with the property transfer affidavit required by Mich. Comp. Laws § 211.27a(8), a section of the Michigan General Property Tax Act (hereafter may be referred to as the GPTA). The affidavit correctly provided the two property tax identification numbers for the parcels and claimed that the parcels were statutorily exempt from taxation since their purchase by the City of Detroit Building Authority.

On November 13, 1997, the DBA requested the City Assessor to make the City of Detroit Municipal Parking Department the taxpayer of record on the City tax assessment roll. By December 2, 1997, the City Assessment roll had been adjusted to reflect that the taxpayer of record for both parcels was the City of Detroit Parking Department.

The DBA also requested the City Assessor to combine the two parcels into a single tax parcel with the known street address of 450 West Congress, as is authorized by Michigan Compiled Laws § 211.25(e). By February 1998, the City Assessor combined the two tax parcels into one tax parcel for property tax purposes. After the combination, the City assessment roll retained the two legal descriptions of the parcels.

It was later learned that Fox Parking had not paid Wayne County property taxes on one of the lots for the 1997 tax year. The DBA was responsible for a portion of the 1997 property taxes based on a prorated basis from the date of its acquisition.

The DBA subsequently financed and constructed a ten-storied public parking garage known as the Millennium Garage. The DBA leased the Millennium Garage to the City under the Master Lease. The City of Detroit Municipal Parking Department occupied and operated the Garage since its opening.

In 1999 Mich. Pub. Acts 123, the Michigan Legislature enacted sweeping changes to its property tax collection system. One of the changes empowered county treasurers for the first time to elect to assume the role of collecting delinquent county property tax collection, which theretofore had exclusively been performed by the State of Michigan, through the Michigan Department of Treasury and the Michigan Attorney General. In 2000, the Wayne County Treasurer assumed the role of delinquent property tax collector for the first time.

Mich. Comp. Laws § 211.78i(6)(c) and (d) required the County Treasurer to review the tax records in the office of the City Assessor or City Treasurer in ascertaining persons with an interest in tax delinquent property. As was found by the trial court below, it was undisputed that the County Treasurer did not review the records of the City Assessor or City Treasurer in ascertaining the identity of persons with an interest in the garage property. On April 16, 2001, the Wayne County Treasurer recorded a certificate of forfeiture of one parcel corresponding to the western half of the high rise Garage for the unpaid 1997 property taxes. The Treasurer did not provide the City of Detroit with pre-forfeiture notices as required

by Mich. Comp. Laws § 211.78b, § 211.78c, and § 211.78f.

The County Treasurer filed suit to foreclose the garage property and numerous other properties on June 14, 2001, in Wayne County Circuit Court No. 01-012001PZ. The County Treasurer did not serve the City with process or with notices of the administrative hearing required by Mich. Comp. Laws § 211.78i(7) or the judicial hearing required by Mich. Comp. Laws § 211.78i.

On July 27, 2001, 2001 Mich. Pub. Act 94, Mich. Comp. Laws § 211.78g, was enacted. That act provided as follows:

> A county treasurer shall withhold a parcel of property from forfeiture for any reason determined by the state tax commission. The procedure for withholding a parcel of land from forfeiture under this subsection shall be determined by the state tax commission.

Wayne County Circuit Court Judge Mary Beth Kelly entered a judgment of foreclosure on the garage property and numerous other properties on March 4, 2002.

On April 17, 2002, the State Tax Commission issued a bulletin identifying which properties were to be withheld from forfeiture by county treasurers. The Bulletin required that publicly owned property be withheld from forfeiture. The Bulletin provided that if publicly held land had been forfeited, the Treasurer was to file a certificate of forfeiture.

The Wayne County Treasurer scheduled the western half of the Millennium Garage to be sold at its annual tax sale on September 26, 2002, five months after the issuance of the tax bulletin. The Treasurer published "Rules and Regulations for the Sale of Tax Foreclosed Properties" in August 2002. Rule 4 expressly provided that "the Wayne County Treasurer reserves the right to reject any or all bids." The successful bidder, Petitioner Michigan Financial Investments, L.L.C., bid $370,000.00.

Three days after the auction, the DBA filed the instant suit to enjoin the transfer of the garage property to Michigan Financial Investments and set aside the tax foreclosure judgment. The City joined the action as a plaintiff.

After being sued by the DBA and the City in the instant case, and before a deed had issued, the Wayne County Treasurer canceled the sale of the Garage property effective November 14, 2002. The Treasurer indicated that the "property had been sold in error."

The County issued a check on November 13, 2002, to MFI in the amount of $370,000.00. On November 14, 2002, the City redeemed the property by paying $4,395.19. In May 2003, the Wayne County Treasurer recorded a certificate of redemption which discharged the certificate of forfeiture on April 16, 2001.

In its motion for summary disposition filed on June 25, 2003, the City contended that the County Treasurer was precluded by Mich. Comp. Laws

§ 211.78g(1), Mich. Comp. Laws § 211.371 and the State Tax Commission Bulletin from forfeiting, foreclosing and auctioning public property. It also argued that it had been deprived of its vested property interest in the garage property and deprived of its statutory right to redeem, without notice and a hearing, in violation of the procedural due process guarantees of the Fourteenth Amendment and the Michigan constitution.

Petitioner Michigan Financial responded to the City's motion on July 25, 2003. While Petitioner argued that the Bulletin should not be applied retroactively, its arguments were based on state law regarding construction of statutes. Petitioner raised no argument that a retroactive application would violate its rights or the County Treasurer's rights under the due process guarantees of the Fourteenth Amendment to the United States Constitution or the due process clause of Mich. Const. art. 1, § 17.

In an opinion and final order entered on December 1, 2003, the trial court ruled that the County Treasurer had deprived the City of identifiable, substantial property interests without affording the City pre-deprivation notice and hearing required by procedural due process guarantees and by state statute. The trial court determined that since the City already tendered the redemption price to the Treasurer, there was no need to provide for a redemption period. The trial court further stated at page 27, note 10, of its opinion that its "resolution of the City's due process arguments moots consideration of

whether the County Treasurer was empowered, sua sponte, to revoke the sale of the Subject Parcel under the authority of a certain State Tax Commission Bulletin issued in April 2002," and for that reason, it would not address the parties' arguments concerning the application of the Bulletin.

Significantly, the Wayne County Treasurer did not appeal from the trial court's judgment which set aside the foreclosure. Michigan Financial filed an appeal to the Michigan Court of Appeals. The County Treasurer did not support any of the positions taken by Michigan Financial in the Michigan Court of Appeals.

On appeal to the Michigan Court of Appeals, the City argued in its Brief for Appellee, pages viii, 18-21, and 40, filed on July 1, 2004, that the trial court's judgment in favor of the City could be affirmed on the alternative ground that the State Tax Commission Bulletin, Mich. Comp. Laws § 211.78g(1), Mich. Comp. Laws § 211.371, and Mich. Comp. Laws § 211.372, barred the County Treasurer from forfeiting, foreclosing, and auctioning the public garage property. The Appellee City maintained at pages 21-22 that the treasurer knew or reasonably should have known from the recorded deed from Fox to the DBA and from the City's assessments records that the garage property was publicly owned.

The Wayne County Treasurer did not challenge the application of the State Tax Commission Bulletin in the Michigan Court of Appeals. Michigan Financial

did not challenge the application of the State Tax Commission Bulletin in the Michigan Court of Appeals.

On July 5, 2005, the Michigan Court of Appeals issued an unpublished opinion which reversed the decision of the trial court and remanded for further proceedings. In a two to one vote, the Court ruled that the trial court erred in holding that the County Treasurer deprived the City of a vested property interest in violation of procedural due process guarantees. The Court of Appeals did not address the alternative grounds raised by the City for affirmance of the trial court, namely, that the application of the State Tax Commission Bulletin prohibited the forfeiture of publicly owned property.

On October 24, 2005, the City of Detroit and the Detroit Building Authority filed applications for leave to appeal to the Michigan Supreme Court. In its application, the City asserted that the Michigan Court of Appeals erred in ruling that the County Treasurer had not violated the City's procedural due process rights. The Appellant City also asserted that it was entitled to relief because the Wayne County Treasurer had been prohibited from forfeiting, foreclosing upon, and auctioning publicly owned property under state statute and the Tax Commission Bulletin. The Detroit Building Authority raised essentially the same issues as the Appellant City. The Wayne County Treasurer did not oppose these applications.

Petitioner Michigan Financial Investments responded to the City of Detroit's application on November 14, 2005. Petitioner's response to the City's application made no argument that either its own rights under the Fourteenth Amendment to the United States constitution, or the County Treasurer's rights under the Fourteenth Amendment to the United States constitution, had been violated by a retroactive active application of the State Tax Commission Bulletin. At pages 40-42 of its response, it cursorily argued that its rights under the federal contract clause, U.S. Const. art. 1, § 10, cl. 1, had been violated. Michigan Financial also filed an application for leave to appeal to the Michigan Supreme Court but raised no federal claim. (Michigan Supreme Court Docket No. 129743).

On September 28, 2007, the Michigan Supreme Court disposed of the three applications by the issuance of three identical, peremptory orders. The three orders contained just four sentences. The Supreme Court ordered that, in lieu of granting the applications for leave to appeal, "we reverse the judgment of the Court of Appeals and reinstate the order of the Wayne County Circuit Court setting aside the foreclosure sale and quieting title to the property in the plaintiff." The peremptory order contained the following two sentence discussion:

> Contrary to the Court of Appeals majority's conclusion, the Wayne County Treasurer had reason to know that the property was publicly owned because there is no dispute

> that the plaintiff Detroit Building Authority, which was incorporated by the intervening plaintiff City of Detroit, Mich. Comp. Laws § 123.951, was the owner of record and had filed both a deed and an affidavit of property transfer notifying the county that the property was tax exempt.

Petitioner filed a motion for reconsideration on October 16, 2007. It claimed that the Michigan Supreme Court retroactively applied the Tax Bulletin in a manner violative of Michigan law announced in *Re Certified Questions*, 331 N.W.2d 456 (1982). (Motion for Reconsideration, pp. 8-11). It maintained that the Wayne County Treasurer had been improperly divested of his property interest in the land. At page 15 of its motion, Michigan Financial Investment cursorily claimed that the Supreme Court's order violated its own rights under the contract clause of the federal constitution, art. 1, § 10, cl. 1. At page 16 of its motion, Michigan Financial cursorily contended for the first time that the Supreme Court violated its own due process rights guaranteed by the Fifth and Fourteenth Amendments. It cited to no federal case law.

In its response to Michigan Financial's motion for reconsideration, the City maintained that Michigan Financial had no standing to assert any legal interests or rights of the County Treasurer. (City of Detroit's Answer to Motion for Reconsideration, pp. 2-6). It also pointed out that the Supreme Court had not retrospectively applied the Bulletin to the auction sale of September 26, 2002, because the Bulletin was

issued five months prior to the auction sale. In addition, it contended in the alternative that the Bulletin related to procedures and remedies for the collection of a delinquent property tax, and could properly be applied in retroactive manner under established state law.

REASONS FOR DENYING THE WRIT

Summary

Petitioner Michigan Financial Investments, L.L.C., has not satisfied the criteria for a grant of certiorari set forth in Sup. Ct. R. 10. Petitioner has not established that the four-sentence order of the Michigan Supreme Court regarding to the Tax Commission Bulletin decided a federal question of law at all, much less an important federal question, in a manner that conflicted with decisions of the United States Court of Appeals or with decisions of this Court.

As discussed in Section I below, the Petitioner did not properly present or preserve the federal question now posed by timely citing or relying upon the Fourteenth Amendment to the federal constitution in the state courts. The Michigan Supreme Court's order of peremptory reversal and order denying reconsideration did not mention or pass upon the Fourteenth Amendment rights of the Petitioner or the Wayne County Treasurer.

The Michigan Supreme Court's peremptory reversal has limited precedential value and limited federal significance, assuming arguendo that Petitioner's federal claim had been timely presented and passed on. The Supreme Court's explanation of its holding was confined to two sentences. It is open to question whether this two-sentence explanation can serve as binding precedent. *See generally People v. Crall*, 510 N.W.2d 182, n. 8 (Mich. 1993) (a summary order is binding precedent where it contains a statement of the applicable facts and reason for the decision). This case is also uniquely fact bound. The Michigan Supreme Court's summary order relative to the State Tax Commission Bulletin will likely have no effect on persons other than the parties to this case. At most, the Michigan Supreme Court's peremptory order will effect only a handful of Michigan county treasurer tax foreclosures of public property that may have occurred during the two-year period prior to April 2002. The result reached by the Michigan Supreme Court is also sustained on other, independent grounds contained in the reinstated judgment of the trial court.

Lastly, the legal arguments advanced by Petitioner are unprevailing, as 1) Petitioner lacks standing to assert the alleged federal due process rights of the Wayne County Treasurer, which were waived by the Treasurer below, and 2) the State Tax Commission rule was not applied here in a retroactive manner that deprived the Petitioner or the County

Treasurer of a vested property interest without procedural due process.

I. THE FEDERAL QUESTION POSED AND BRIEFED BY PETITIONER WAS NOT PROPERLY PRESENTED AND PRESERVED IN THE STATE COURTS.

Petitioner failed to carry its burden of showing that the federal question it raises and briefs in its Petition for Certiorari was properly presented to the Michigan Supreme Court. Accordingly, this Court should not grant the Petition for Certiorari.

This Court does not review a final judgment of a state court under 28 U.S.C. § 1257(a) unless the record as a whole shows that the federal claim was adequately presented in the state system. *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987). It is necessary for the petitioner to have clearly cited in his state court petition the federal source of law on which he relies, or a case deciding such a claim on federal grounds. *Howell v. Mississippi*, 543 U.S. 440, 443-445 (2005); *Adams v. Robertson*, 520 U.S. 83, 89 (1997). As noted in *Howell*, 543 U.S. 444, n. 2, "'[P]assing invocations of 'due process' that 'fail to cite the Federal Constitution or any cases relying on the Fourteenth Amendment' do not meet our minimal requirement that it must be clear that a federal claim was presented,'" citing *Adams*, 520 U.S. 89, n. 3. Particularly where state constitutions contain counterpart provisions to

the federal constitution, a petitioner must demonstrate that he clearly invoked the federal provision in state court, or else the state court will be viewed as having considered the constitutional challenge to be based in the state constitution. *Webb*, 451 U.S. 496-498.

Here, the Petitioner failed to cite the Fourteenth Amendment as a basis for a federal claim in the lower state courts or in the Michigan Supreme Court prior to September 28, 2007. Petitioner asserted no express violation of its own rights protected by the Fourteenth Amendment to the federal Constitution, and no express violation of the due process rights of the Wayne County Treasurer under the Fourteenth Amendment, prior to the Michigan Supreme Court's peremptory decision of September 28, 2007. Petitioner's pleadings and other filings contained no reference to the Fourteenth Amendment to the federal constitution or even to the counterpart due process clause of the 1963 Mich. Const. art. 1, § 17. Neither Petitioner's Brief in Opposition to the City's Application for Leave to Appeal to the Michigan Supreme Court nor the Petitioner's Brief in Opposition to the Detroit Building Authority Application for Leave to Appeal, cited to the Fourteenth Amendment or asserted federal due process rights.

The Michigan Supreme Court did not mention or discuss the Fourteenth Amendment to the federal constitution, or even the term "due process of law" in its order summarily disposing of the case.

Petitioner indicates at page 11 of its Petition that it preserved a Fourteenth Amendment claim in its motion for reconsideration filed in the Michigan Supreme Court on October 17, 2007. Petitioner's motion for reconsideration argued at pages 15-16 that the Supreme Court's order violated it's own rights under U.S. Const. art. 1, § 10, cl. 1 (providing that no state shall pass any law impairing the obligation of contracts). Petitioner also made oblique references to its federal procedural and substantive due process rights.

However, this Court has ruled that it will generally refuse "to consider issues raised clearly for the first time in a petition for rehearing when the state court is silent on the question." *Adams*, 520 U.S. 89, n. 3, citing *Board of Directors of Rotary International*, 481 U.S. 549-550; *Hanson v. Denckla*, 357 U.S. 235, 244, n. 4 (1958); and *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128 (1945). In *Board of Directors of Rotary International*, 481 U.S. 537, this Court refused to consider a federal claim that was first squarely raised in the state appellate court in a petition for rehearing where the state court denied the petition for rehearing without opinion. It held that when "'"the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary."'" citing *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181, n. 3 (1983) (quoting *Fuller v. Oregon*, 417 U.S. 40, 50,

n. 11 (1974) (in turn quoting *Street v. New York*, 394 U.S. 576, 582 (1969)).

The Michigan Supreme Court was indeed silent on the federal question now posed by Petitioner in its order denying the Petitioner's motion for reconsideration. It did not refer to the Fourteenth Amendment or to Petitioner's due process rights. Thus, this Court should refuse to consider the argument obliquely raised for the first time in Petitioner's motion for reconsideration.

II. PETITIONER LACKS CONSTITUTIONAL STANDING AS IT SEEKS TO ASSERT THE ALLEGED FOURTEENTH AMENDMENT RIGHTS OF AN OPPOSING LITIGANT, THE WAYNE COUNTY TREASURER, AND NOT ITS OWN FOURTEENTH AMENDMENT RIGHTS.

Petitioner Michigan Financial Investments now asserts that the alleged retroactive application of the State Tax Commission Bulletin deprived the Wayne County Treasurer of his vested right in the foreclosure judgment without procedural due process guarantees of the federal constitution. However, Petitioner may not seek review on this ground because it has no standing to assert the federal due process rights of another.

It must be noted that Petitioner has not properly presented in this Court any claim that it has been

deprived of its own property rights without procedural due process. Petitioner did mount a defensive argument as appellee in the Michigan Supreme Court that a retroactive application of the Tax Bulletin would impair its own contract rights under the auction sale agreement, without citation to any federal source or authority. (Brief in Response to the City's Application for Leave to Appeal, p. 40). And, as stated above, Petitioner's motion for reconsideration of the peremptory order cited the Contract Clause and claimed that its rights thereunder were violated by the peremptory order. Petitioner framed its statement of question presented for review as whether that the Michigan Supreme Court denied "its" constitutional right to due process of law. (Petition for Writ of Certiorari, p. i). However, Petitioner failed to brief or otherwise develop any legal authority in support of its perfunctory statement that "its" own federal due process rights had been violated. By failing to adequately brief and cite legal authority in support of the issue of a deprivation of its own Fourteenth Amendment rights, Petitioner has waived and abandoned that issue in this Court. *See generally Moore v. La-Fayette Life Ins. Co.*, 458 F.3d 416, 448 (6th Cir. 2006); *Linc Finance Corp. v. Onwuteaka*, 129 F.3d 917, 921 (7th Cir. 1997); *McPherson v. Kelsey*, 125 F.3d 989, 995 (6th Cir. 1997), cert. den., 523 U.S. 1050 (1998).

Petitioner has no standing to now claim that the retroactive application of the Tax Bulletin violated

the Fourteenth Amendment due process rights of the Wayne County Treasurer.

It is a cardinal rule that constitutional rights are personal in nature. *Los Angeles Police Department v. United Reporting Publishing Corp.*, 528 U.S. 32, 39 (1999); *New York v. Ferber*, 458 U.S. 747, 767 (1982); *McGowan v. Maryland*, 366 U.S. 420, 429 (1961). In light of the general rule that a litigant may only assert his own constitutional rights or immunities, a litigant has no standing to assert the constitutional rights of others. *Broderick v. Oklahoma*, 413 U.S. 601, 610 (1973); *U.S. v. Raines*, 362 U.S. 17 (1960).

Under this general principle of constitutional standing, the constitutional rights of the Wayne County Treasurer are personal to the Office of the County Treasurer. Petitioner Michigan Financial Investments thus lacks standing to assert the personal constitutional rights of the Office of the Wayne County Treasurer. The very few exceptions to the traditional rule of constitutional standing, such as the First Amendment overbreadth doctrine, are factually inapplicable to this case, and have not, at any rate, been pleaded or otherwise raised by Petitioner in the lower courts.

The jurisprudential concerns underlying the rules of standing resonate in this case, where the legal interests of the Treasurer and Petitioner are conflicting and where the Treasurer waived any procedural due process claim he hypothetically may have had. The Treasurer never challenged the State's

issuance of the Tax Commission Bulletin or its application to the Garage property. The defendant Wayne County Treasurer never asserted a claim or argument that the application of the State Tax Commission Rule to the publicly owned garage deprived him of a vested property right. Indeed, it is debatable whether the Treasurer even had standing to mount a due process challenge to a retroactive application of Mich. Comp. Laws § 211.78 and the Bulletin. *See generally Mayor of Detroit v. Arms Technology, Inc.*, 669 N.W.2d 845, 856-858 (Mich. Ct. App. 2003); *Kent County Aeronautics Board v. Michigan Department of State Police*, 609 N.W.2d 593, 603 (Mich. Ct. App. 2000).

The County Treasurer consistently took the position that on November 14, 2002, it lawfully exercised its contract right to cancel the September 26, 2002, auction sale to Petitioner, prior to the conveyance of any deed to Petitioner. The Petitioner's sale contract with the Treasurer was subject to the law in effect at the time of the September 26, 2002, auction sale and hence subject to Mich. Comp. Laws § 211.78g(1), and the State Tax Commission Rules enacted on April 17, 2002. The County Treasurer advised Petitioner Michigan Financial that the auction sale was cancelled and issued a $370,000.00 check to Michigan Financial on November 13, 2002.

On November 14, 2002, the County Treasurer accepted the payment of the redemption amount of $4,395.19, from the Detroit Building Authority and the City of Detroit. In May 2003, the Treasurer recorded a redemption certificate to the City of

Detroit, which discharged the certificate of forfeiture recorded on April 16, 2001. In short, the Treasurer's actions in cancelling the sale to petitioner and in discharging the certificate of forfeiture, complied with the State Tax Commission Rules that directed the setting aside of forfeited public property. The County Treasurer did not appeal from the trial court's final opinion and judgment of December 1, 2003, which declared that the foreclosure judgment and the subsequent Treasurer's sale to Michigan Financial were set aside (opinion, p. 28). By not challenging the State's issuance of the Tax Commission Bulletin or the application of the Rule to the Garage Property, the Treasurer waived any hypothetical due process claim he may have had.

III. PETITIONER ALSO FAILS TO SHOW THAT THE APPLICATION OF MICH. COMP. LAWS § 211.78(G)(1) AND THE STATE TAX COMMISSION RULE TO THE PUBLICLY OWNED GARAGE, RETROACTIVELY DIVESTED THE COUNTY TREASURER OF A VESTED PROPERTY RIGHT, IN VIOLATION OF THE TREASURER'S FOURTEENTH AMENDMENT RIGHTS.

As argued by the City and the Detroit Building Authority in the three levels of state courts, the County Treasurer was precluded by state law from forfeiting and auctioning the public property to Petitioner, Michigan Financial Investment. The Michigan Supreme Court agreed with the City and the DBA.

As stated above, the Michigan Supreme Court's orders were silent on any issue as to whether the Treasurer's Fourteenth Amendment rights were violated by a retroactive application of the Tax Bulletin. Petitioner's arguments regarding unconstitutional retroactivity are devoid of merit and the Michigan Supreme Court would have been entitled to reject them out of hand.

The terms of the Bulletin itself were retrospective. It instructed what must be done where property already has been forfeited. The Bulletin provides that where a Parcel not subject to forfeiture actually is forfeited, the County Treasurer shall remove all of the fees attached to the parcel, file a certificate of cancellation of forfeiture with the register of Deeds, and notify the State Treasurer. Under Mich. Comp. Laws § 211.78(g)(1) and its implementing Bulletin, the subject parcel was not subject to forfeiture.

The City argued below that the Bulletin really did not bring about a new change of the law in the first place. Section 371 of the GPTA prohibits the sale of publicly owned land which is acquired by tax foreclosure proceedings where that ownership can be discovered as a matter of public record before the sale. Public ownership under § 371 includes property owned by a public corporation like the DBA. In *Ziegler v. Simmons*, 91 N.W.2d 819, 822-823 (Mich. 1958), the Michigan Supreme Court held that the word "discover" used in § 371 "would necessarily include constructive notice by recording."

The Wayne County Treasurer, under the 1999 amendments to GTPA, has replaced the state agencies (Treasurer and Department of Natural Resources), which for decades foreclosed upon county taxes, acquired title, and sold at auction or otherwise disposed of land. A county, known under the amended GTPA as the "foreclosing governmental unit" (FGU), stands in the shoes once occupied by the state of Michigan in tax foreclosure proceedings.

The legislature did not repeal Mich. Comp. Laws § 211.371 when it adopted the 1999 amendments to the GTPA. That fact is significant given that the 1999 act repealed over a number of years, numerous other inconsistent or obsolete provisions. Mich. Comp. Laws § 211.371 must be read and applied in light of legislature's decision to not repeal that section. Mich. Comp. Laws § 211.371 must be applied to FGUs like Wayne County which have taken over the role and functions long performed by state treasurer and the Michigan Department of Natural Resources.

Application of Mich. Comp. Laws § 211.371 to FGUs like Wayne County is supported by the fact that the revised GTPA allows a county to elect to have the state foreclose and sell property. Mich. Comp. Laws § 211.78(3). Where a county elects under Mich. Comp. Laws § 211.78(3) to have the state foreclose on tax delinquent property, the state would be bound to

follow Mich. Comp. Laws § 211.371.[1] A FGU is performing a function that prior to 1999 could only be performed by the state. It would be anomalous, indeed repugnant to the very purpose and intent of the GTPA, to hold that Section 371 does not apply to FGUs when it would apply to the state performing the same function in lieu of an FGU.

The legislative policy to not sell publicly owned land is reflected in the legislative purpose of the 1999 GPTA changes:

> The legislature finds that there exists in this state a continuing need to strengthen and revitalize the economy of this state and its municipalities by encouraging the efficient and expedient return to productive use of property returned for delinquent taxes. Therefore, the powers granted in this act relating to the return of property for delinquent taxes constitute the performance by this state or a political subdivision of this state of essential public purposes and functions. Mich. Comp. Laws § 211.78(1).

Section 78(1) of the GPTA must be read in pari materia and harmonized with Section 371 of that same act. *See State Treasurer v. Schuster*, 572 N.W.2d

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[1] Where a county elects to have the state foreclose upon (and later sell such property), after forfeiture to the county treasurer under § 78g, the county treasurer "shall immediately transmit to the state treasurer a copy of each certificate recorded under this section." Mich. Comp. Laws § 211.78g(2).

628 (Mich. 1998). Likewise, § 371 must be read in pari materia with the Tax Commission Bulletin barring even the forfeiture of public land.

Moreover, a retroactive application of the Bulletin could not violate any vested rights of the Treasurer as the Bulletin was a procedural, remedial, and curative change in the tax law which may be given retroactive effect.

In the absence of any language indicating retroactive effect, a statute is presumed to act prospectively. *Pohutski v. City of Allen Park*, 641 N.W.2d 219, 234 (Mich. 2002). However, the general rule of prospectivity does not apply to statutes or amendments that are remedial or procedural. *Travis v. Preston*, 643 N.W.2d 235, 240 (Mich. Ct. App. 2002).

It has been long settled that Michigan statutory proceedings on a sale of tax delinquent land "is a remedy for the delinquency of the taxpayer." *Muirhand v. Sands*, 69 N.W. 826, 828 (Mich. 1897). The state law affecting the remedy for the delinquency of property taxes is subject to amendment that may be given retroactive effect without destroying vested rights. *Id.*; *City of Detroit v. Walker*, 520 N.W.2d 135, 144-145 (Mich. 1994); *Baker v. State Land Office Board*, 293 N.W. 763, 767-768 (Mich. 1940); *Webster v. Auditor General*, 80 N.W. 705, 706-707 (Mich. 1899).

Mich. Comp. Laws § 211.78(g)(1) and the Bulletin thereunder effected a procedural change to the county's in rem remedy for property tax delinquency under the GPTA and may be applied retroactively.

The delinquent 1997 county taxes still remained a lien and an obligation to the County Treasurer. The County Treasurer retained an in personam collection remedy. The County Treasurer in fact received full payment of that delinquent tax obligation.

A retroactive application of the Commission Rule to the Treasurer's interests would pass muster under the standard employed by this Court in *U.S. v. Carlton*, 512 U.S. 26, 30-31 (1994), when evaluating retroactive federal tax legislation. The retroactive application of the Tax Commission rule is justified by a rational legislative purpose. It was not arbitrary or illegitimate. On its face, the Tax Bulletin is curative. It was clearly intended to prevent publicly owned and developed assets, particularly assets which serve the public, from being lost to the public through a mistaken administration of the tax collection program. The economy of a municipality is certainly not strengthened, by selling vital, publicly owned land and facilities at tax auction at great financial loss to the public.

The interests of the County Treasurer is not that of a private litigant with private expectations. In collecting delinquent county taxes, the Treasurer acts as the agent of the State. The greater protection against retroactivity ordinarily afforded a private litigant is hence inapplicable in this case. *See generally Jorge Aledo-Garcia v. Puerto Rico National Guard Fund*, 887 F.2d 354, 356 (1st Cir. 1989).

The legitimate legislative purpose is furthered by rational means. The Treasurer effects a cancellation of forfeiture of publicly owned property. In the instant case, Petitioner had notice, under existing state law and rules in effect prior to the auction, of the duty of the Treasurer to cancel the forfeiture of publicly owned land. The Treasurer effected a full return of the auction payment to Petitioner. The Treasurer received payment of the property tax delinquency. No harsh or oppressive result obtained here.

IV. THE PETITION SHOULD BE DENIED AS THE TRIAL COURT'S JUDGMENT CORRECTLY SET ASIDE THE TREASURER'S FORFEITURE AND FORECLOSE OF THE PUBLIC GARAGE ON AN INDEPENDENT GROUND.

The Michigan Supreme Court reversed the Michigan Court of Appeals and reinstated the judgment of the trial court. The judgment of the trial court correctly set aside the County Treasurer's forfeiture, foreclosure, and auction sale of the public garage. The trial court did so on the express basis that the County Treasurer failed to give the City its due process and statutory rights to notice of the pendency of foreclosure proceedings and of its statutory right to redeem. (Petitioner's Appendix 56a-57a). The judgment of the trial court is justified and supportable on this alternative and independent ground.

The City possessed a sufficient, identifiable property interest protected by due process. It was

undisputed that the County Treasurer failed to perform the public record search required by Mich. Comp. Laws §§ 211.78(i)(6)(c) and (d). (Petitioner's Appendix 50a). The trial court correctly ruled that the County Treasurer's means of providing service, namely, publication, and a posting on a weekend when the garage was closed, were not reasonably calculated to provide notice of the foreclosure proceedings to an ascertainable interest holder. (Petitioner's Appendix 53a). *See generally Jones v. Flowers*, 547 U.S. 220, 226 (2006); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798 (1983); *Sidun v. Wayne County Treasurer*, ___ N.W.2d ___ (Michigan Supreme Court No. 131905, released July 2, 2008); *Dow v. Michigan*, 240 N.W.2d 450 (Mich. 1976). Since the City had not been provided with the notice of forfeiture and foreclosure proceedings, or notice of its statutory redemption rights, as required by the GPTA and by the due process guarantees of the federal and state constitutions, the trial court properly set aside the judgment of foreclosure and granted the City an opportunity to redeem the property. *See generally In re Petition by Wayne Co. Treasurer*, 732 N.W.2d 458 (Mich. 2007).

CONCLUSION

Petitioner has not demonstrated any compelling reason for this Court to grant the Petition for Writ of Certiorari. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

LINDA FEGINS
Counsel of Record
JOANNE D. STAFFORD
660 Woodward, Ste. 1650
Detroit, MI 48226
(313) 237-3069
Attorney for Respondent
City of Detroit

DATED: July 24, 2008

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No. 07-1605

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In The

Supreme Court of the United States

MICHIGAN FINANCIAL INVESTMENTS, L.L.C.,

Petitioner,

v.

DETROIT BUILDING AUTHORITY, and
CITY OF DETROIT,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Michigan

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

G. ALLEN BASS
Counsel of Record
LEWIS & MUNDAY, P.C.
2490 First National Building
660 Woodward Avenue
Detroit, Michigan 48226
(313) 961-2550

Attorney for Respondent
The Detroit Building Authority

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. WHETHER THIS COURT HAS JURISDICTION UNDER 28 U.S.C. § 1257 TO REVIEW PETITIONER'S FOURTEENTH AMENDMENT DUE PROCESS VIOLATION CLAIM WHERE PETITIONER FAILED TO PROPERLY PRESENT THIS CLAIM TO THE STATE COURTS AND THE STATE COURTS FAILED TO DECIDE THIS ISSUE?

2. WHETHER PETITIONER LACKS STANDING WHERE IT SEEKS TO ASSERT THE ALLEGED FOURTEENTH AMENDMENT RIGHTS OF THE WAYNE COUNTY TREASURER AND NOT ITS OWN FOURTEENTH AMENDMENT RIGHTS?

3. WHETHER PETITIONER HAS ESTABLISHED ANY VIOLATION OF ITS OWN FOURTEENTH AMENDMENT DUE PROCESS RIGHTS WHERE THE MICHIGAN SUPREME COURT RELIED ON AN APRIL 2002 RULE PROMULGATED BY THE MICHIGAN STATE TAX COMMISSION PROHIBITING THE FORECLOSURE OF PROPERTY OWNED BY A GOVERNMENTAL ENTITY TO PRECLUDE PETITIONER FROM OBTAINING THE PROPERTY IN A PUBLIC AUCTION FIVE MONTHS LATER OR WHETHER PETITIONER HAS WAIVED THIS CLAIM BY FAILING TO ADEQUATELY BRIEF AND CITE LEGAL AUTHORITY IN SUPPORT OF THIS CLAIM?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Detroit Building Authority is a municipal corporation which has no parent company and no corporate stock.

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OPINIONS BELOW

The list of lower court citations set forth at page 1 of the Petition is correct.

COUNTER-STATEMENT OF JURISDICTION

Petitioner's recitation of the procedural history of the case is correct. However, Respondent Detroit Building Authority submits that this Court does not have federal question jurisdiction under 28 U.S.C. § 1257(a) because the purported federal question posed in the Petition for Writ of Certiorari was not decided by the state courts. Petitioner failed to raise the one federal claim that it now presents to this Court prior to the Michigan Supreme Court's summary order of September 28, 2007.

Petitioner's state court pleadings and other filings prior to its motion for rehearing in the Michigan Supreme Court asserted no express violation of its own rights protected by the Fourteenth Amendment to the United States Constitution, and no express violation of the due process rights of the Wayne County Treasurer. They contained no reference to the Fourteenth Amendment to the United States Constitution, or even to the due process clause of the 1963 Michigan Constitution. The Michigan Supreme Court's order summarily disposing of this case neither mentioned nor discussed the Fourteenth Amendment to the United States Constitution, or the term "due process of law."

Although Petitioner's motion for rehearing in the Michigan Supreme Court made a cursory reference to due process rights under the Fourteenth Amendment, it quoted the contract clause and failed to cite any cases construing the Fourteenth Amendment. The Michigan Supreme Court's one-sentence order denying Petitioner's motion for reconsideration did not mention or decide the federal question now posed by Petitioner. Accordingly, federal question jurisdiction is lacking. *Exxon Corp v. Eagerton*, 426 U.S. 176, 181, n. 3 (1983); *Fuller v. Oregon*, 417 U.S. 40, n. 11 (1974); *Webb v. Webb*, 451 U.S. 493, 497-500 (1981); *Cardinale v. Louisiana*, 394 U.S. 437, 438-439 (1969); *Gibbes v. Zimmerman*, 290 U.S. 326, 328 (1933).

Even if this presentation requirement were deemed to be prudential rather than jurisdictional, the Petition should be denied based on Petitioner's failure to satisfy its burden of showing that the federal issue posed was properly presented in the state court. *Howell v. Mississippi*, 543 U.S. 440, 443-445 (2005).

CONSTITUTIONAL PROVISION, STATUTE AND REGULATION INVOLVED

The Fourteenth Amendment
to the United States Constitution

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and

of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Mich. Comp. Laws. § 211.78g(1)

Except as otherwise provided in this subsection, on March 1 in each tax year, certified abandoned property and property that is delinquent for taxes, interest, penalties, and fees for the immediately preceding 12 months or more is forfeited to the county treasure for the total amount of those unpaid delinquent taxes, interest, penalties, and fees. If property is forfeited to a county treasurer under this subsection, the foreclosing governmental unit does not have a right to possession of the property until the April 1 immediately succeeding the entry of a judgment foreclosing the property under section 78k or in a contested case until 22 days after the entry of a judgment foreclosing the property under section 78k. If property is forfeited to a county treasurer under this subsection, the county treasurer shall add a $175.00 fee to each parcel of property for which those delinquent taxes, interest, penalties, and fees remain unpaid. A county treasurer shall withhold a parcel of property from forfeiture for any reason determined by the state tax commission. The procedure for

withholding a parcel of property from forfeiture under this subsection shall be determined by the state tax commission.

Michigan State Tax Commission
Bulletin Dated April 17, 2002

Reasons to Withhold a Parcel of Property From Forfeiture and Procedures for Withholding a Property From Forfeiture.

The State Tax Commission, at its meeting on April 17, 2002, determined that the following are the reasons that a parcel of property shall be withheld from forfeiture:

* * *

2) A property owned by the U.S. Government, the State of Michigan, a county, a city, a village or a township shall be withheld from forfeiture.

Procedure: If the property is forfeited in error, the County Treasurer removes all of the fees attached to the parcel, files a certificate of cancellation of forfeiture (form 3839) with the Register of Deeds. Notifies the State Treasurer and the Contractor of the error. The State Treasurer will withhold the parcel from foreclosure and stop all title work on the parcel.

COUNTER-STATEMENT OF THE CASE

On May 29, 1997, the Detroit Building Authority purchased two parcels of property for three million dollars and recorded the warranty deed with the Wayne County Register of Deeds on June 25, 1997. As required by the Michigan Building Authority Act, 1948 Mich. Pub. Acts 31 as amended, Mich. Comp. Laws § 123.954, the Detroit Building Authority leased the facilities to the City of Detroit and must convey title to the property to the City at the end of the lease term or the conclusion of its financing, making the City the residual and beneficial owner of the leased properties that enjoys a vested future interest in same. See Mich. Comp. Laws § 123.958; Mich. Comp. Laws § 123.963.

The Detroit Building Authority requested the City Assessor to make the City of Detroit Municipal Parking Department the taxpayer of record on the City tax assessment roll, and to combine the two adjoining tax parcels into a single tax parcel with a known street address of 450 West Congress. By December 2, 1997, the City Assessment roll had been adjusted to reflect that the taxpayer of record for both parcels was the City of Detroit Parking Department. By February 1998, the two parcels had been combined into one parcel for tax purposes.

The Detroit Building Authority financed and constructed a ten-story parking garage on the property at a cost approaching ten million dollars. The

City of Detroit Municipal Parking Department has operated the garage since its opening.

It was subsequently learned that the prior owner had not paid Wayne County property taxes on one of the lots for the 1997 tax year. The Detroit Building Authority was responsible for a prorated share of the 1997 property taxes based on the acquisition date.

In 1999 Mich. Pub. Acts 123, the Michigan Legislature enacted broad changes to its property tax collection system. For the first time, Wayne County was permitted to assume the role of delinquent property tax collector formerly played by the State Department of Treasury and Natural Resources. In 2000, the Wayne County Treasurer assumed the role of delinquent property tax collector for the first time.

Mich. Comp. Laws § 211.78i(6)(c) and (d) required the County Treasurer to review the tax records in the City Assessor's or City Treasurer's office to ascertain persons with an interest in tax delinquent property. As the trial court below found, it was undisputed that the County Treasurer did not review the records of the City Assessor or City Treasurer in ascertaining the identity of persons with an interest in the property.

On April 16, 2001, the Wayne County Treasurer recorded a certificate of forfeiture of one parcel for the unpaid 1997 property taxes. The Treasurer did not provide the City of Detroit with pre-forfeiture notices as required by Mich. Comp. Laws. § 211.78b, § 211.782, and § 211.78f. The Treasurer filed suit to

foreclose the property on June 14, 2001, but did not serve the City with process or other required notices.

On July 27, 2001, the Michigan Legislature enacted 2001 Mich. Pub. Act 94, Mich. Comp. Laws § 211.78g, which provided as follows:

> A county treasurer shall withhold a parcel of property from forfeiture for any reason determined by the state tax commission. The procedure for withholding a parcel of land from forfeiture under this subsection shall be determined by the state tax commission.

On March 4, 2002, the Wayne County Circuit Court entered a judgment of foreclosure on the property.

On April 17, 2002, the State Tax Commission issued a bulletin identifying properties that were to be withheld from forfeiture by county treasurers. The bulletin provided that property owned by the U.S. Government, the State of Michigan, a county, a city, a village, or a township shall be withheld from forfeiture.

The Wayne County Treasurer scheduled the property to be sold at its annual tax sale on September 26, 2002, five months after issuance of the tax bulletin. The Treasurer published "Rules and Regulations for the Sale of Tax Foreclosed Properties." Rule 4 expressly provided that "the Wayne County Treasurer reserves the right to reject any and all bids." Petitioner bid $370,000.00 and was the successful bidder.

Three days after the auction, the Detroit Building Authority filed suit to enjoin the transfer of the garage property to Petitioner and set aside the tax foreclosure judgment. The City of Detroit joined the action as a plaintiff and Petitioner intervened.

After being sued by the Detroit Building Authority and the City, the Wayne County Treasurer cancelled the sale of the property and allowed the City of Detroit to redeem the property effective November 14, 2002. The Treasurer indicated that the "property had been sold in error." The County issued a check to Petitioner Michigan Financial Investments, L.L.C. (MFI) in the amount of $370,000.00. In May 2003, the Wayne County Treasurer recorded a certificate of redemption discharging the certificate of forfeiture that had been recorded on April 16, 2001.

On June 17, 2003, the City moved for leave to file a cross-claim against the County Treasurer and a counterclaim against Petitioner for declaratory and injunctive relief. The City claimed that it had not received the proper notice of the foreclosure proceedings as required by the Michigan statutes and the United States Constitution. The City moved for summary disposition on June 25, 2003, arguing that the County Treasurer was precluded by Mich. Comp. Laws § 211.78g(1) and the State Tax Commission Bulletin from forfeiting, foreclosing and auctioning the property. It also argued that it had been deprived of its vested property interest in the garage property without notice and a hearing, in violation of its procedural due process guarantees of the Fourteenth Amendment and the Michigan Constitution. Petitioner

MFI responded to the City's motion on July 25, 2003. While Petitioner argued that the Bulletin should not be applied retroactively, its arguments were based on state law regarding construction of statutes. Petitioner did not raise any argument that a retroactive application would violate its rights, or the County Treasurer's rights, under the due process clause of the Fourteenth Amendment to the United States Constitution or the due process clause of the Michigan Constitution.

In an opinion dated December 1, 2003, the trial court ruled that the County Treasurer had deprived the City of identifiable, substantial property interests without the requisite procedural due process.

MFI timely appealed the opinion and order to the Michigan Court of Appeals. Significantly, the Wayne County Treasurer did not appeal the trial court's judgment setting aside the foreclosure judgment in favor of the County Treasurer. The City argued in its Brief for Appellee, pages viii, 18-22, filed on July 1, 2004, that the trial court's judgment in favor of the City could be affirmed on the alternative ground that the State Tax Commission Bulletin, Mich. Comp. Laws § 211.78g(1), Mich. Comp. Laws § 211.371, and Mich. Comp. Laws § 211.372, barred the County Treasurer from forfeiting, foreclosing, and auctioning the public garage property. The Appellee City maintained at pages 21-22 that the County Treasurer knew or reasonably should have known from the recorded deed to the Detroit Building Authority and from the City's assessments records that the property was publicly owned.

On July 5, 2005, the Michigan Court of Appeals issued an unpublished opinion reversing the decision of the trial court and remanding for further proceedings. In a 2-1 vote, the Court ruled that the circuit court erred in holding that the County Treasurer had deprived the City of a vested property interest in violation of procedural due process guarantees.

On October 24, 2005, the Detroit Building Authority and the City filed an application for leave to appeal to the Michigan Supreme Court. In their applications, the City and the Detroit Building Authority asserted that the March 2002 judgment of foreclosure should be set aside because the notice provided to the City was inadequate. Alternatively, both argued that they were entitled to relief because the Wayne County Treasurer was precluded from forfeiting, foreclosing upon and auctioning publicly owned property under state statute and the Tax Commission Bulletin. The Wayne County Treasurer did not oppose those applications.

Petitioner MFI responded to the City's and the Detroit Building Authority's applications, but failed to include any argument that either its own rights under the Fourteenth Amendment to the United States Constitution or the County Treasurer's rights under the Fourteenth Amendment, would be violated by a retroactive application of the State Tax Commission Bulletin. Petitioner cursorily argued at pages 40-42 of its response that its rights under the federal contract clause, U.S. Const. art. 1, § 10, cl. 1, had been violated.

Petitioner also filed its own application for leave to appeal, but raised no federal claims.

On September 28, 2007, the Michigan Supreme Court disposed of all three applications by issuing an order reversing the Court of Appeals and reinstating the order of the Wayne County Circuit Court setting aside the foreclosure sale. The Court's order stated that the foreclosure sale of publicly owned property is prohibited and that the Wayne County Treasurer had reason to know that the property was publicly owned.

Petitioner filed a motion for reconsideration on October 16, 2007. It claimed at pages 8-11 of its motion that the Michigan Supreme Court retroactively applied the Tax Bulletin in a manner violative of Michigan law as set forth in *In Re Certified Questions*, 331 N.W.2d 456 (1982). It maintained that the Wayne County Treasurer had been improperly divested of its property interest in the land. On page 15 of its motion, MFI cursorily claimed that the Supreme Court's order violated its own rights under the contract clause of the federal constitution, U.S. Const. art. 1, § 10, cl. 1. At page 16 of its motion, MFI cursorily contended for the first time that the Supreme Court violated its own due process rights guaranteed by the Fifth and Fourteenth Amendments. It cited no federal case law.

In its response to MFI's motion for reconsideration, the Detroit Building Authority maintained that MFI lacked standing to assert any legal interest or rights of the County Treasurer. (Detroit Building

Authority's Response to Motion for Reconsideration, pages 3-5.) It also argued on pages 4-5 that the Supreme Court had not retrospectively applied the Bulletin to the auction sale of September 26, 2002 because the Bulletin had been issued six months prior to the sale. Additionally, it contended in the alternative that the Bulletin related to procedures and remedies and could properly be applied in a retroactive manner under established state law.

REASONS FOR DENYING THE WRIT

Summary

The Petitioner has not satisfied any of the criteria for a grant of certiorari set forth in Sup. Ct. R. 10. The Petitioner has not established that the Michigan Supreme Court's order even decided a federal question of law, much less an important federal question in a way that conflicts with decisions of a United States Court of Appeals, or this Court.

Petitioner did not properly present or preserve the federal question now posed by timely citing or relying upon the Fourteenth Amendment to the federal constitution in the state courts. The Michigan Supreme Court's order did not mention or decide any Fourteenth Amendment rights of the Petitioner. In fact, a careful reading of the Petition establishes that Petitioner is attempting to assert not its own Fourteenth Amendment rights before this Court, but the Fourteenth Amendment rights of the Wayne County

Treasurer. Petitioner lacks standing to make such an argument. Petitioner does not have its own Fourteenth Amendment due process violation claim because the Tax Commission Bulletin was promulgated in April 2002, five months *before* Petitioner bid on the property in September 2002.

I. THE FEDERAL QUESTION POSED AND BRIEFED BY PETITIONER WAS NOT PROPERLY PRESENTED AND PRESERVED IN THE STATE COURTS

Petitioner failed to carry its burden of showing that the federal question raised in its Petition for Certiorari was properly presented to or addressed by the Michigan Supreme Court. Accordingly, this Court should not grant the Petition for Certiorari.

With rare exceptions, in reviewing state court judgments under 28 U.S.C. § 1257(a), this Court will not consider a petitioner's federal claim "[u]nless it was either addressed by, or properly presented to, the state court that rendered the decision." *Adams v. Robertson*, 520 U.S. 83, 86 (1997). The Michigan Supreme Court did not address Petitioner's federal claim. Neither the order summarily disposing of the case nor the one-sentence order denying Petitioner's motion for rehearing referenced, mentioned or discussed the Fourteenth Amendment or any due process rights.

Nor was Petitioner's federal claim properly presented to the state court. To properly present a

federal claim, petitioner must have clearly cited in his state court petition the federal source of law on which he relies, or a case deciding such a claim on federal grounds. *Howell v. Mississippi*, 543 U.S. 440, 443-445 (2005). "Passing invocations of 'due process' that 'fail to cite the Federal Constitution or any cases relying on the Fourteenth Amendment' do not 'meet our minimal requirement that it must be clear that a federal claim was presented.'" *Howell*, 543 U.S. 444, n. 2, citing *Adams v. Robertson*, 520 U.S. 83, 89, n. 3 (1997).

Petitioner failed to cite the Fourteenth Amendment as a basis for a federal claim in the lower state courts or in the Michigan Supreme Court prior to the Supreme Court's September 28, 2007 order. Neither Petitioner's Brief in Opposition to the Detroit Building Authority's Application for Leave to Appeal nor Petitioner's Brief in Opposition to the City's Application for Leave to Appeal cited to the Fourteenth Amendment or to federal due process rights.

Petitioner states at page 11 of its Petition that it preserved a Fourteenth Amendment claim in its motion for reconsideration filed in the Michigan Supreme Court. Petitioner's October 17, 2007 motion contained a short one-paragraph argument at pages 15-16 that the Supreme Court's order violated its own rights under the Contract Clause of the federal constitution, U.S. Const. art. 1, § 10, cl. 1 (providing that no state shall pass any law impairing the obligation of contracts.) Petitioner also made a cursory one-sentence reference to its due process rights under the Fourteenth Amendment on page 11 and

another one-sentence reference on page 16. Such a cursory reference to a purported federal claim in a motion for rehearing does not constitute a proper presentation of the claim sufficient to invoke this Court's jurisdiction.

This Court will generally refuse "to consider issues raised clearly for the first time in a petition for rehearing when the state court is silent on the question." *Adams*, 520 U.S. 89, n. 3, citing *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549-550 (1987); *Hanson v. Denckla*, 357 U.S. 235, 244, n. 4 (1958); and *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128 (1945). In *Board of Directors of Rotary Int'l*, 481 U.S. 537, this Court refused to consider a federal claim that was first squarely raised in the state appellate court in a petition for rehearing where the state court denied the petition without opinion. The Court held that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary," citing *Exxon Corp v. Eagerton*, 462 U.S. 176, 181, n. 3 (1983) (quoting *Fuller v. Oregon*, 417 U.S. 40, 50, n. 11 (1974)) (in turn quoting *Street v. New York*, 394 U.S. 576, 582 (1969)).

The Michigan Supreme Court's March 24, 2008 order denying Petitioner's motion for reconsideration was silent on the federal question now posed by Petitioner. Absent a showing to the contrary by Petitioner, and there has been none, it is assumed that Petitioner did not make a proper presentation of

the federal claim in state court. Consequently, this Court should deny the Petition and refuse to consider the federal question raised for the first time, obliquely, in a motion for reconsideration at the state's highest court.

II. PETITIONER LACKS STANDING WHERE IT SEEKS TO ASSERT THE ALLEGED FOURTEENTH AMENDMENT RIGHTS OF THE WAYNE COUNTY TREASURER

Petitioner asserts at pages 13-14 of its Petition that the alleged retroactive application of the State Tax Commission Bulletin by the Michigan Supreme Court deprived the Wayne County Treasurer of his vested right in the foreclosure judgment without the procedural due process guarantees of the federal constitution. Petitioner may not seek review on this ground because it lacks standing to assert the alleged Fourteenth Amendment Rights of another.

Constitutional rights are personal in nature. *Los Angeles Police Dep't v. United Reporting Publishing Corp.*, 528 U.S. 32, 39 (1999); *New York v. Ferber*, 458 U.S. 747, 767 (1982); *McGowan v. Maryland*, 366 U.S. 420, 429 (1961). A litigant may only assert his own constitutional rights or immunities; he has no standing to assert the constitutional rights of others. *Broderick v. Oklahoma*, 413 U.S. 601, 610 (1973); *McGowan v. Maryland*, 366 U.S. 429; *U.S. v. Raines*, 362 U.S. 17, 22 (1960).

Under this general principle of constitutional standing, the constitutional rights of the Wayne County Treasurer are personal to the Office of the County Treasurer. Petitioner lacks standing to assert those personal constitutional rights. Accordingly, the Petition should be denied.

III. PETITIONER HAS NOT ESTABLISHED ANY VIOLATION OF ITS OWN FOURTEENTH AMENDMENT RIGHTS AND HAS WAIVED ANY SUCH CLAIM BY FAILING TO SHOW HOW PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED

The Petition should also be denied where Petitioner has not properly presented any claim that it has been deprived of its own property rights without due process of law. Though Petitioner did argue in the Michigan Supreme Court that a retroactive application of the Tax Bulletin would impair its contract rights under the auction sale agreement, Petitioner has never presented or established any claim for a violation of its own Fourteenth Amendment rights.

The Tax Commission Bulletin was promulgated on April 17, 2002. Petitioner did not bid on the property until September 26, 2002, or more than five months *after* the Tax Commission Bulletin had been promulgated. Because Petitioner did not have any right to the property before the Tax Commission Bulletin had been promulgated, Petitioner cannot establish that the Michigan Supreme Court's reliance on the Tax Commission Bulletin deprived Petitioner

of its due process rights under the Fourteenth Amendment.

Moreover, although Petitioner's Question Presented asks whether the Michigan Supreme Court denied *Petitioner's* constitutional due process rights, Petitioner has argued that the *Wayne County Treasurer's* due process rights were violated. This is aptly seen at pages 11-12 of the Petition, where Petitioner writes that "[i]f the Michigan Supreme Court's decision in this case stands, this interest which the Wayne County Treasurer acquired as of March 26, 2002, has been undone by a State Tax Commission rule fundamentally changing existing law." Petitioner's failure to brief or otherwise develop any legal authority in support of its perfunctory statement that "its" own federal due process rights had been violated constitutes a waiver and abandonment of this argument. See generally *Moore v. Lafayette Life Ins. Co.*, 458 F.3d 416, 448 (6th Cir. 2006). Accordingly, the Petition should be denied.

CONCLUSION

Petitioner has not demonstrated any compelling reason for this Court to grant the Petition for Writ of Certiorari. Accordingly, the Petition should be denied.

Respectfully submitted,

G. ALLEN BASS
Counsel of Record
LEWIS & MUNDAY, P.C.
2490 First National Building
660 Woodward Avenue
Detroit, Michigan 48226
(313) 961-2550

Attorney for Respondent
The Detroit Building Authority

Dated: July 24, 2008